

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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77-1026

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

IRVING HAIMSON,

Appellant.

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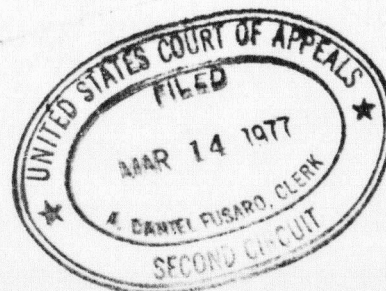
On Appeal From The United States District
Court for the Eastern District of New York

APPELLANT'S APPENDIX

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Of Counsel
276 Fifth Avenue
New York, New York 10001
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New York, New York 10001
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TABLE OF CONTENTS

| | <u>PAGE</u> |
|--|-------------|
| Relevant Docket Entries | A-1 |
| Indictment | A-3 |
| Motion to Suppress Evidence (Request for Unrelated Relief Omitted) | A-4 |
| Memorandum and Order Denying Motion to Suppress Evidence | A-9 |
| Superseding Information | A-17 |
| Judgment and Probation/Commitment Order | A-19 |
| Notice of Appeal | A-21 |
| Transcript of Hearing - August 6, 1976 - Re: Suppression Motion | 1 |
| <u>Government Witnesses</u> | |
| Patrick F. Colgan, Jr. - Direct | 4 |
| Cross | 36 |
| Redirect | 110 |
| Donald E. Dowd - Direct | 113 |
| Cross | 120 |
| Colloquy | 135 |
| <u>Government's Exhibits in Evidence</u> | |
| G-1 (A through K) - Photographs - In Evid. p. 14 - not reproduced in Appendix (See Second Supplemental Record on Appeal) .. | |
| G-2 - Carton - In Evid. p. 33 - Not Reproduced in Appendix. | |
| Excerpts from Transcript of Hearing - October 27, 1976 - Re: Plea of Guilty - Showing Reservation of Right to Review Suppression Order on Appeal from Judgment | 148 |

TABLE OF CONTENTS
(Continued)

| | <u>PAGE</u> |
|--|-------------|
| Excerpts from Transcript of Hearing - December 17, 1976 - Re: Sentence - Showing Reservation of Right to Review Suppression Order on Appeal from Judgment | 152 |

RELEVANT DOCKET ENTRIESUNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

IRVING HAIMSON

March 20, 1975 Before Platt, J. - Indictment filed.

April 28, 1975 Notice of motion for suppression***
filed returnable May 13, 1975

August 6, 1976 Before Pratt, J. - Case called - defendant
and counsel Ralph Matalon present - suppression
hearing held and concluded - decision reserved.

August 26, 1976 By Pratt, J. - Memorandum and Order filed
denying defendant's motion suppress the
evidence relating to the 633 cartons of shoes
and statements made etc. ***

October 27, 1976 Before Pratt, J. - Case called. Defendant and
counsel present. Defendant withdraws his plea
of not guilty and after being advised of his
rights and on his own behalf enters a plea of
guilty to the superseding information. De-
fendant signs Waiver of Indictment. Bail
continued. Sentence adjourned without date.

October 27, 1976 Superseding Information filed.

October 27, 1976 Waiver of Indictment filed.

December 17, 1976 Before Pratt, J. - Case called. Defendant
and counsel present. Defendant sentenced on
the Superseding Indictment (sic) as charged
pursuant to Title 18, U.S.C. Section 3651.
The defendant is fined \$2,500.00. The defendant
is sentenced to imprisonment for 3 years. The
defendant to serve 6 months in a jail type
institution and the execution of the remainder
of prison sentence is suspended and the de-
fendant is to commence a 2 1/2 year proba-
tionary term commencing at the conclusion

Relevant Docket Entries

of prison sentence. Stay of execution of sentence for a period of one week. If there is an appeal, the sentence is to commence after determination of the appeal. On motion of AUSA Corcoran, the underlying indictment is dismissed.

December 17, 1976 Judgment and Commitment filed. ****

December 20, 1976 Notice of Appeal filed. Docket entries and duplicate of notice mailed to Court of Appeals.

INDICTMENT

RJD:PFC:cj
F.#751,262

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA,

-against-

IRVING HAIMSON,

Defendant.

----- x

THE GRAND JURY CHARGES:

On or about the 13th day of February, 1975, within the Eastern District of New York, the defendant IRVING HAIMSON did wilfully and unlawfully receive and have in his possession approximately 633 cartons of Dunham Shoes, having a value in excess of One Hundred Dollars (\$100.00), which goods had been stolen from a St. Johnsbury Trucking Company tractor trailer while moving as a part of and constituting an interstate shipment of freight from Brooklyn, New York to Brattleboro, Vermont, the defendant IRVING HAIMSON knowing the same to have been stolen. (Title 18, United States Code, Section 659).

FILED A-3
IN CLERK'S OFFICE
U S DISTRICT COURT E.D. NY
★ MAR 20 1975 ★

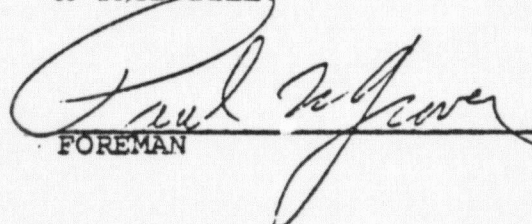
TIME AM.....
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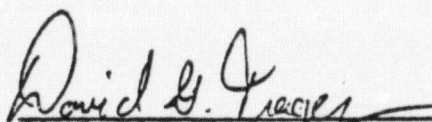
INDICTMENT

Cr. No. _____
(T. 18, U.S.C., §659)

75CR 219

A TRUE BILL


FOREMAN


DAVID G. TRAGER
United States Attorney
Eastern District of New York

MOTION TO SUPPRESS EVIDENCE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Indictment No. 75 CR 219
18, USC 8659

-against-

IRVING HAIMSON,

COMBINED MOTIONS

- A. SUPPRESSION OF EVIDENCE
- B. BILL OF PARTICULARS
- C. DISCOVERY & INSPECTION

Defendant.

PLEASE TAKE NOTICE, that upon the annexed affidavit of RALPH A. MATALON, ESQ., dated April 16, 1975, the annexed Indictment and upon all the papers and proceedings had herein, a Motion will be made on the 13th day of May, 1975, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, in Courtroom #1, second floor, United States District Court for the Eastern District of New York, 225 Cadman Plaza East, in the Borough of Brooklyn, for an Order:

A. Pursuant to Rule 41 of the Federal Rules of Civil (sic) Procedure suppressing certain evidence seized.

* * * * *

Dated: New York, New York
April 16, 1975

Yours, etc.,

MATALON & SCHACHTER
Attorneys for Defendant
276 Fifth Avenue
New York, New York 10001
212 - 683-2549

TO:

DAVID TRAGER, Esq.
United States Attorney
Eastern District of New York
Federal Building
Brooklyn, New York 11201

Motion to Suppress Evidence

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

AFFIRMATION

IRVING HAIMSON,

Defendant.

STATE OF NEW YORK)
 SS.:
COUNTY OF NEW YORK)

RALPH A. MATALON, being an attorney duly admitted to practice in the United States District Court, Eastern District of New York, affirms that the following statements are true under the penalties of perjury, pursuant to Title 18 USCA Sec. 1621.

This affirmation is submitted in support of the defendant's Combined Motions for an Order of Suppression of Evidence, a Bill of Particulars and a Discovery Inspection as more fully described in the Notice of Motion herein.

The defendant, according to the indictment, is charged with willful and unlawfully receiving and having in his possession, approximately 633 cartons of Dunham shoes, having a value in excess of \$100.00, which goods were allegedly stolen from a St. Johnsbury Trucking Company trailer while moving as a

Motion to Suppress Evidence

part of an interstate shipment as more fully set forth in the indictment.

It appears further that said crime was allegedly committed on February 13, 1975. The defendant pleaded not guilty to the one count indictment and is presently free on his own recognizance.

The defendant's motion to suppress any evidence seized illegally contrary to the laws of the Constitution of the United States of America is based upon the grounds that the Special Agent investigating this case had more than ample time to secure a search warrant prior to the illegal seizure. It appears that no offense was committed in the presence of or within the view of any of the arresting agents or any of the officers or Special agents conducting the illegal search.

That the subject search and seizure was not incident to a lawful arrest of the defendant and that no lawful or constitutional circumstances were occasioned to make said search and seizure valid and lawful.

It is important to note that the alleged crime had been committed on or about February 13, 1975 as alleged in the indictment, but that the seizure did not take place by Special Agent Patrick Colgan of the Federal Bureau of Investigation until February 19, 1975. The Court should be reasonably suspect of the time differential factor and certainly the very purpose of

Motion to Suppress Evidence

the securing of a warrant to conduct a search and seizure is present in this case.

Upon information and belief, prior to February 19, 1975, Special Agent Colgan was observed in the vicinity of 139-11 95th Avenue, Jamaica, New York and had been there some two or three days prior to said date. Instead of following the lawful constitutional procedures of securing a search warrant, which, based upon Special Agent Colgan's surveillance he had ample time to secure, the agent sought in violation of the United States Constitution, to conduct a search in violation of the defendant's rights, without securing a search warrant. It is abundantly clear that the Special Agent had adequate time prior to conducting the warrantless, illegal search to obtain a search warrant as is required by the United States Constitution. Special Agent Colgan's failure to obtain a search warrant was unreasonable and contrary to the Fourth Amendment of the United States Constitution and violative of the defendant's rights herein.

The Court should also be cognizant of the fact that the premises upon which this seizure was made is a commercial warehouse owned by a corporation or persons other than the defendant and that the warehouse premises where the Dunham shoes were found, is shared by several sublessees and consequently the defendant did not have exclusive control of the warehouse premises wherein the alleged stolen goods were illegally seized. It

Motion to Suppress Evidence


appears that the indictment is faulty and defective on its face in that it does not allege that the goods were seized on such commercial premises as set forth herein and consequently the exclusivity of control of the illegally seized goods is questionable.

Of necessity in order to pursue the proper defense and in order to give this defendant the best defense which the Constitution guarantees prior to the granting of this motion, if the Court so sees fit, it would be necessary for this defendant to have the requested information in his demand for a Bill of Particulars.

Because of the factors raised in this affirmation and brought to the attention of this Court, it is reasonably apparent that such information is necessary for the defendant to properly conduct a defense of this action and pursue the motion to suppress, especially since the Court directed an immediate trial after the hearing on the motion is held.

WHEREFORE, it is respectfully requested that the relief be granted herein.

Dated: New York, New York
April 16th, 1975


RALPH A. MATALON

MEMORANDUM AND ORDER DENYING MOTION TO
SUPPRESS EVIDENCE

A-9

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x
UNITED STATES OF AMERICA,

Plaintiff, DOCKET NO. 75 CR 219

- against - MEMORANDUM AND ORDER

IRVING HAIMSON,

Defendant.

- - - - - x

Defendant is charged with unlawful possession of approximately 633 cartons of Dunham Shoes in violation of 18 U.S. Code §659. The shoes were found in a warehouse run by defendant at 139-11 95th Avenue, Jamaica, Queens. Defendant has moved to suppress the cartons of shoes and certain of defendant's statements as evidence in the trial. A hearing was held before this court on August 6, 1976, during which the testimony of two FBI agents was heard. No contradictory testimony was presented.

The court has reviewed the testimony, observed the witnesses and studied the exhibits presented. Nothing in the testimony of the witnesses was found to be contradictory or incredible. On the basis of all of the evidence the court makes the following findings and conclusions.

Prior to February 18, 1975, the Federal Bureau of Investigation learned that a tractor-trailer loaded with 633

Memorandum and Order denying motion to
suppress evidence

cartons of shoes of the Dunham Shoe Company of Brattleboro, Vermont, having a value of approximately \$180,000 had been hijacked. Information from a confidential informant to Agent Patrick Colgan indicated that the shoes were stored in a warehouse building in the general vicinity of Van Wyck Expressway and Atlantic Avenue in Queens. Agent Colgan was told that the shoes were within two blocks of that intersection.

The following day, Colgan made a general investigation in the area driving around the general area alone in his car and walking some of the streets. He found nothing to arouse his suspicions.

The following day, Colgan returned with eight or ten other agents in three or four cars. Since there were a number of warehouses in the area, the agents in teams went through several of the warehouses making searches on consent of the owner. The area of their search throughout the morning hours was concentrated on the west side of the Van Wyck Expressway where Colgan testified he had "presumed" the shoes would be found.

At about noontime, most of the agents abandoned the search but Colgan and two others "on a hunch" decided to investigate the area east of Van Wyck Expressway. They went to

Memorandum and Order denying motion to
suppress evidence

the general area of the subject property, parked their car, and agents Colgan and Dowd began walking along the street, leaving the third agent near the car.

As they reached the subject premises the garage door was open, revealing the interior of a warehouse building having a truck bay inside with a raised loading dock around the truck area. As he walked along the street Colgan looked inside and saw six or eight cartons on the right hand side of the raised loading area. From the street he could see the identifying marks he was searching for, which consisted of a large red diamond inside of which were printed the letters "MIC" and "LB:040". Elsewhere on the carton were the words "Franciscano" in black and "Francisco-Franciscano Brazil" in red.

On seeing the cartons Colgan, who was in the lead, stopped immediately, turned to Dowd, said, "We have found the shipment", and asked Dowd to get assistance. Colgan waited until Dowd had returned to the car to have the third agent radio for help, and then Colgan and Dowd entered the warehouse building. They walked on to the loading platform on the right hand side, passed the six or eight cartons they had previously seen, and approached two men in the rear near an office enclos-

Memorandum and Order denying motion to
suppress evidence

ure. They went to the men and asked who was the owner. Defendant Haimson said, "I am the owner" and came out of the enclosure. The agents then identified themselves, and told Haimson they had seen cartons from the street with markings of the hijacked shipment. Haimson then said he was not the owner, but the renter of the building, and indicated that he operated a warehouse storage and shipping business from it.

The agents asked Haimson if he would consent to a search and told him that he did not have to consent but had the right to require them to obtain a search warrant. Haimson said he understood that he had the right to demand a warrant, but said that a warrant was not necessary, and he consented that they make the search. Haimson then went with Colgan to the six or eight cartons which Colgan had seen from the street. Colgan made a positive identification of those cartons and asked Haimson if he had any more of them. Haimson answered, "Yes, they're all right here," indicating with his hand a large number of cartons in the right rear portion of the warehouse building as viewed from the street. Colgan then saw for the first time the larger number of cartons, a subsequent inventory of which confirmed the exact figure of 633, the number which had been stolen.

Memorandum and Order denying motion to
suppress evidence

On cross examination it developed that Colgan had passed by this very building the previous day in his general search of the area. Colgan claimed, however, that he had not seen the cartons on that occasion. The door had been open but Colgan stated, it was a bright sunny day and he was walking with his face toward the sun, so that as he walked by the open door he only glanced in and could see things only dimly because his eyes were not adjusted to the darker interior. He said he saw a light on and a man silhouetted against it. In addition, he was approaching the building on that occasion from the side on which the cartons were located and, therefore, did not in his short glance into the building see the portion of the warehouse in which the cartons were found on the next day.

Both agents agreed that they had not considered getting a search warrant, that they had no feeling of danger on entering the premises, and that there was no sign of activity indicating exigent circumstances or any likelihood that the cartons would be removed promptly. In the course of the questioning, Haimson acknowledged that it was his freight area even though some of the freight stored there belonged to other people.

The defendant claims the search was an unlawful in-

Memorandum and Order denying motion to
suppress evidence

vasion of his constitutional rights and, carried on as it was without a warrant, was an unlawful search procedure within the meaning of the fourth amendment. More particularly, defendant claims the agents had time to get a warrant, that they had an obligation to get a warrant before conducting a consent search and that, in any event, the consent given by Haimson was not an informed consent but was given with a protestation of innocence and was the result of his fear of the FBI.

The Government claims that at least the six or eight cartons first seen by Colgan from the street were in plain view and, therefore, were in a public area, not protected by the fourth amendment. The Government contends, moreover, that the search was conducted pursuant to a valid consent given by the defendant.

On this record, it seems clear that the agents did have time to obtain a warrant; but they had no obligation to do so when Haimson consented to the search. Haimson's consent to the search was validly and intelligently given after being informed of his rights. Both agents testified that Haimson was initially informed that the shoes had been hijacked from a truck and that some of the cartons were there in plain view. He was asked if he would consent to a search and told that he

Memorandum and Order denying motion to
suppress evidence

did not have to consent and that Haimson could require the agents to obtain a search warrant.

Colgan testified, without contradiction, that Haimson indicated that he understood what his constitutional rights were, and told the agents that a warrant would not be necessary. Haimson went further than that, moreover, since he led the agents to the cartons which had been originally seen from the street, and then pointed out the remaining cartons to Colgan. There is nothing in the evidence to suggest coercion, fear, trickery, overbearing of the defendant's will, or any other circumstance which might invalidate the consent whose evidence is so clear on this record.

Defendant's counsel has submitted nine cases in support of his legal position on the motion to suppress: Coolidge v. New Hampshire, 403 US 443, 91 SCt 2022 (1971); U.S. v. Bradshaw, 490 F2d 1097 (CA 4 1974) cert den 419 US 895 (1974); U.S. v. Rothman, 492 F2d 1260 (CA 9 1973); Judd v. U.S., 190 F2d 649 (CADC 1951); Schneckloth Conservation Center Superintendent v. Bustamonte, 412 US 218, 93 SCt 2041 (1973); Reagan v. U.S., 157 US 301, 15 SCt 610 (1895); Jones v. U.S., 307 F2d 190 (CADC 1962) cert den 372 US 919 (1963); Ballard v. U.S., 237 F2d 582 (CADC 1956) cert den 352 US 1017 (1957); and

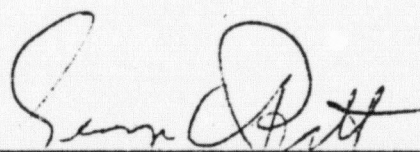
Memorandum and Order denying motion to
suppress evidence

Wigfall v. U.S., 230 F2d 220 (CADC 1956). Discussion of these authorities is unnecessary, since there is nothing contained in these cases which on the facts as found above would warrant the granting of the motion.

Accordingly, the defendant's motion to suppress the evidence relating to the 633 cartons of shoes and the statements made by defendant Haimson in connection with the seizure of the shoes is denied. The case is set down for a status conference on Friday, September 3, 1976 at 1:45 P.M. for the purpose of fixing a trial date.

SO ORDERED.

Dated: Brooklyn, New York
August 26, 1976



GEORGE C. PRATT
U. S. DISTRICT JUDGE

TRP:PFC:cj
F.#763,451

SUPERSEDING INFORMATION

A-17

FILED

IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ OCT 27 1976 ★

TIME A.M.

P.M.

SUPERSEDING INFORMATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA

-against-

IRVING HAIMSON,

Defendant.

----- x

THE UNITED STATES ATTORNEY CHARGES:

On or about the 13th day of February, 1975, within the Eastern District of New York, the defendant IRVING HAIMSON together with others not named herein, did knowingly, wilfully and unlawfully combine, conspire, confederate and agree to commit an offense against the United States in violation of Title 18, United States Code, Section 659, in that they did conspire to possess approximately six hundred and thirty-three (633) cartons of Dunham Shoes, having a value in excess of One Hundred Dollars (\$100.00), which goods had been stolen from a St. Johnsbury Trucking Company tractor-trailer, while moving as a part of and constituting an interstate shipment of freight from Brooklyn, New York to Brattleboro, Vermont, the defendant IRVING HAIMSON knowing the same to have been stolen. In furtherance of said conspiracy, and for the purpose of effecting the objectives thereof, the defendant IRVING HAIMSON committed the following:

Cr. No. 75 CR 219 (S)
(T. 18, U.S.C., §371)

Superseding Information

A-18

O V E R T A C T

1. On or about the 13th day of February, 1975, the defendant IRVING HAIMSON, did receive and have in his possession at 139-11 95th Avenue, Queens, New York, approximately six hundred thirty-three (633) cartons of stolen Dunham Shoes. (Title 18, United States Code, Section 371).

David G. Trager

DAVID G. TRAGER
United States Attorney
Eastern District of New York

Q

JUDGMENT AND PROBATION/COMMITMENT ORDER

A-19

United States of America vs.

M.F.I.

United States District Court for

DEFENDANT

EASTERN DISTRICT OF NEW YORK

IRVING HAIMSON

DOCKET NO. ➔

75 CR 219 (S)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date ➔

MONTH DAY YEAR

DECEMBER 17, 1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Ralph A. Matalon, Esq.

(Name of counsel)

PLEA

☒ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE, **FILED** ☐ NOT GUILTY

U. S. DISTRICT COURT E.D. N.Y.

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged
☐ GUILTY.

DEC 17 1976

TIME A.M. _____

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C., Section 371 in that on or about February 13, 1975, the defendant, with others did knowingly, wilfully and unlawfully combine, conspire to possess approximately 633 cartons of Dunham Shoes, having a value in excess of One Hundred Dollars (\$100.00), which goods had been stolen from a Saint Johnsbury Trucking Company tractor-trailer, while moving as a part of and constituting an interstate shipment of freight, the defendant knowing the same to have been stolen.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE
OR
PROBATION
ORDER

The defendant is sentenced on the Superseding Indictment as charged pursuant to T-18, U.S.C., Section 3651. The defendant is fined Two Thousand Five Hundred Dollars (\$2,500.00). The defendant is sentenced to imprisonment for three (3) years. The defendant to serve six (6) months in a jail type institution and the execution of the remainder of prison sentence is suspended and the defendant is to commence a two and a half (2½) year probationary term commencing at the conclusion of prison sentence. Stay of execution of sentence for a period of one (1) week. If there is an appeal, the sentence is to commence after determination of the appeal. On motion of the Assistant United States Attorney, Paul Corcoran, the underlying indictment is dismissed.

SPECIAL
CONDITIONS
OF
PROBATION

Judgment and Probation/Commitment Order**ADDITIONAL
CONDITIONS
OF
PROBATION**

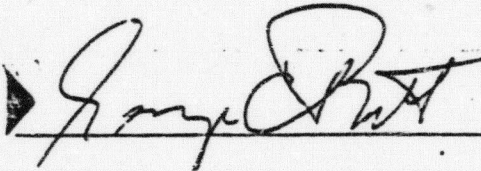
In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

**COMMITMENT
RECOMMEN-
DATION**

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge☐ U.S. Magistrate

Date

12/17/76

12 Q

NOTICE OF APPEAL
UNITED STATES DISTRICT COURT

A-21

EASTERN DISTRICT
UNITED STATES OF
AMERICA

PLAINTIFF

- against -

IRVING HANSON

DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that IRVING HANSON appeals to

the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other

(specify) _____ entered in this action on 12/17/76
(Date)

Date 12/17/76
To:

Address

RALPH A. MATHALON
(Counsel for Appellant)
276 5TH AVE
NEW YORK, N.Y.
10001

Phone Number

683-2549

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

QUESTIONNAIRE

- ☒ I am ordering a transcript
☐ I am not ordering a transcript
Reason:
☐ Daily copy is available
☐ U.S. Attorney has placed order
☐ Other. Attach explanation

TRANSCRIPT ORDER

- Prepare transcript of
☒ Pre-trial proceedings
☐ Trial
☐ Sentence
☐ Post-trial proceedings

DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE).

(Suppression Hearing & Re Argument)
HARRY RAPAPORT C.S.R.

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ☒ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature

Ralph A. Mathalon

DATE

12/17/76

COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number
of pages.

Date

Signature

(Court Reporter)

ORIGINAL

BEST COPY AVAILABLE

13

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 -----x

4 THE UNITED STATES OF AMERICA :

5 - against - : 75 CR 219

6 IRVING HAIMSON, :

7 Defendant. :

8 -----x

9 UNITED STATES COURTHOUSE
10 August 6, 1976

11 B E F O R E:

12 HONORABLE GEORGE C. PRATT, U.S.D.J.

13
14
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16
17
18
19
20 HARRY RAPAPORT, C.S.R.
21 Acting Official Court Reporter
22
23
24
25

A P P E A R A N C E S:

DAVID G. TRAGER, ESQ.,
U.S. ATTORNEY FOR THE EASTERN DISTRICT
OF NEW YORK,

By: PAUL COCORAN, ESQ.,
Assistant U.S. Attorney,
For the Government.

RALPH A. MATALON, ESQ.,
For the Defendant.

1
2 THE COURT: I apologize for the delay,
3 gentlemen, but this miscellaneous part is some-
4 what unpredictable.

5 MR. MATALON: If anybody owes an apology,
6 I do, for not appearing yesterday. And I
7 humbly apologize to the Court.

8 THE COURT: Your apology is accepted if
9 you are ready to go today.

10 All right, let's proceed. I will have to
11 interrupt when the Marshal gets up here and we
12 decide what we have to do with Mr. Pavlet
13 (phonetic spelling).

14 All right, let's go.

15 We will take some reasonable period for
16 lunch and I have twenty or twenty-five status
17 conferences at 2:00 o'clock.

18 MR. MATALON: What time will your Honor
19 want to break for lunch?

20 THE COURT: 1:15.

21 MR. COCORAN: For the record, this hearing
22 is in response to Mr. Matalon's motion on Mr.
23 Haimson's behalf to suppress certain evidence
24 received from 139-11 95th Street on the 19th of
25 February, 1975; and that will be the scope of

1
2 the hearing.

3 (Whereupon an unrelated matter is taken
4 up by the Court.)

5 THE COURT: Call your first witness.

6 MR. COCORAN: Yes.

7 The Government calls Patrick Colgan.

8 P A T R I C K F. C O L G A N, J R., called as
9 a witness by the Government, having been first duly
10 sworn by the clerk of the court, was examined and
11 testified as follows:

12 THE CLERK: Please state your full name
13 for the record.

14 THE WITNESS: Colgan, C-o-l-g-a-n,
15 Patrick F. Jr.

16 DIRECT EXAMINATION

17 BY MR. COCORAN:

18 Q Mr. Colgan, by whom are you employed, sir?

19 A The Federal Bureau of Investigation.

20 Q How long have you been with the Bureau?

21 A Six and a half years.

22 Q Assigned to any particular squad?

23 A Yes, I am. I am on what is called the Truck
24 Hijacking Squad in my office.

25 Q How long have you been with the

1

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Hijacking Squad?

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A Six years--I'm sorry, five and a half years.

4

Q You were working with that Squad in

5

February of 1975?

6

A Yes, I was.

7

Q Did you have occasion to investigate

8

at that time an alleged theft of shoes from St. Johns-

9

bury Trucking Company on or about February 13th, 1975?

10

A Yes, I did.

11

Q And was that case assigned to you, sir?

12

A Yes, it was.

13

Q And what if anything did your investigation

14

initially reveal?

15

A On the 13th of February 1976 approximately four

16

to five in the afternoon a St. Johnsbury tractor-trailer

17

being driven by a Mr. Auciello was hijacked at the

18

intersection of 20th Street and Third Avenue in

19

Brooklyn by three Negro males.

20

Q And was anything taken from that St.

21

Johnsbury driver at that time?

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A Yes. Taken from him was this tractor-trailer

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he was driving containing 633 cartons of shoes consigned

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from Pier 39 in Brooklyn to Dunham Shoe Company in

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Vermont.

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Q Do you know what particular city in Vermont it was?

A Perhaps Braddle Borough (phonetic spelling).

Q Did you learn the value of that particular shipment?

A During the investigation I was contacted from officials from St. Johnsbury who advised me of the interstate nature of the merchandise as well as the approximate value of \$180,000--

MR. MATALON: I object, your Honor, as to what he learned from a third party. It's hearsay.

THE COURT: Overruled.

We are not bound by the rules of evidence here.

Q Did you subsequently receive any information from other sources with respect to the subsequent--

MR. MATALON: I hate to interrupt. May I have the answer about the money, please?

THE COURT: \$180,000.

THE WITNESS: Approximately.

Repeat the question, please.

Q Did you subsequently receive any further

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information with regard to the stolen Dunham Shoes?

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A Yes, I did.

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Q What information did you receive?

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A I received confidential information that the stolen load of Dunham Shoes was contained in some type of warehouse building near the intersection of the Van Wyck Expressway and Atlantic Avenue in Queens, New York.

9

10

Q Approximately when did you receive this information, Agent Colgan?

11

12

A I believe I received this information on the night of the 17th of February.

13

14

Q Did you have occasion to act upon that information?

15

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A On the 18th of February I conducted an investigation in the general area of the Van Wyck Expressway and Atlantic Avenue in Queens, yes.

18

19

Q Were you accompanied by any other agent?

20

A On the 18th, no, I was not.

21

Q Approximately what time did you go out

22

to that area?

23

A I was out there a good portion of the afternoon.

24

Q And what exactly did you do?

25

A I drove around the immediate vicinity of the

1
2 west side of the Van Wyck Expressway on Atlantic
3 Avenue and on some side streets as well as the east
4 side of the Van Wyck Expressway off Atlantic Avenue
5 and some side streets.

6 Also, I got out of my vehicle a number of times
7 on both sides of the Expressway and walked by buildings
8 that to me could have been a location for stolen goods.

9 Q Your information is not then to the
10 specific location of the stolen goods?

11 A Absolutely not.

12 Q Did you have occasion to locate those
13 goods on February 18th, 1975?

14 A No, I did not.

15 Q Did you have occasion to return to that
16 location?

17 A Yes, sir. The next day of February 19th--I'm
18 not quite sure of the day of the week it was--it might
19 have been a Wednesday, the 19th of February, 1975,
20 myself and other agents of the Federal Bureau of
21 Investigation conducted what we call just requests for
22 consent searches in a number of buildings in the
23 general area of Atlantic Avenue and the Van Wyck
24 Expressway.

25 Q Approximately how many agents went out

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with you, if you recall?

A There might have been eight to ten agents in three to four cars that went to the vicinity, initially the west area of the Van Wyck.

Q Approximately what time did you go out there?

A We left the office 10:00 o'clock in the morning.

Q And did you have occasion to enter any premises with regard to that search?

A Yes, we did. We entered at least--at least two and probably three buildings on the west side of the Van Wyck, just off of Atlantic Avenue area.

At these buildings we contacted officials who were controlling the premises and requested consent searches.

In each case we were allowed to search. And during these morning hours we did not find any of the stolen goods we were looking for.

Q What happened then, sir?

A Well, because of the fact that we were getting near noontime and we were not too successful we decided to break off and leave. However, I suggested to myself and to other agents in one car that we just go on the other side of the Van Wyck Expressway, the

1
2 east side near Atlantic Avenue, and perhaps reverse
3 the direction that we were going in on the west side
4 of the Van Wyck.

5 Q So the information had led you to believe
6 that the stolen--

7 THE COURT: Just a moment. I didn't
8 understand what you meant by perhaps we reversed
9 the direction we were going in.

10 THE WITNESS: The information we were
11 working on was in the general vicinity of the
12 Expressway and Atlantic Avenue, your Honor.

13 THE COURT: Yes.

14 THE WITNESS: The directions we had from
15 the confidential source were not that explicit.
16 However, the directions more or less said within
17 two blocks of the Van Wyck and Atlantic Avenue
18 on the west side.

19 THE COURT: Oh, on the west side?

20 THE WITNESS: Well, west side was not
21 stated, but we presumed the west side by this
22 confidential source.

23 Now, what I am stating now is that we
24 decided to reverse the directions and stay within
25 a two block radius, but on the east side of the

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Van Wyck, which was not the information we had.
It was just a hunch.

THE COURT: All right.

BY MR. COCORAN:

Q Approximately what time then did you
proceed to the west side?

A As I said, we were more or less breaking for
lunchtime so it had to be approximately 12:00 noon.

Q And who went with you on that search,
sir?

A Myself, Agent Dowd and I believe the third
agent was Agent Pistone (phonetic spelling).

Q And the other agents at that time did
what?

A They had other things to do on that day and they
just left from the west side of the Van Wyck and
Atlantic Avenue area.

Q At that time they ceased to search for
the goods. Is that correct?

A Yes, yes.

Q Where then did you go on the east side
of Atlantic Avenue?

A I proceeded to the general area of 139-11 95th
Avenue in Queens.

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Q Had you ever been in that vicinity prior to February 19th?

A Yes.

Q When was that?

A I was there on the day before, the 18th of February.

Q What happened when you arrived there on the 19th?

A On the 19th we parked our vehicle and proceeded towards an opened bay door of that location, 139-11 95th Avenue.

As soon as I entered--I actually did not enter. As soon as I came upon the opening actually to enter my eyes fell upon cartons that bore labels and markings that I knew to be from the stolen load.

MR. MATALON: May we have that answer reread, if your Honor please, by the court reporter?

THE COURT: Please read it.

(Court reporter reads the requested portion.)

Q What labels and markings were you looking for, Mr. Colgan?

A Prior to even going out on an investigation we

1
2 always obtained certain markings of the stolen goods.
3 In this case I was able to obtain markings from
4 St. Johnsbury Trucking Company that the stolen load
5 would be marked in a red diamond, the letterings in
6 black, MIC, would contain a number inside the red
7 diamond, LB0040, as well as in big red letters else-
8 where on the carton, Francisco--Franciscano, Brazil.

9 MR. COCORAN: At this time, your Honor,
10 I ask that Government Exhibit 1-A through 1-K
11 be marked for identification.

12 THE COURT: Eleven photographs marked
13 for identification as Government Exhibit 1-A
14 through 1-K.

15 (Handed to Mr. Matalon.)

16 MR. MATALON: I have no objection, your
17 Honor.

18 THE COURT: Are they being offered in
19 evidence as photographs of the cartons?

20 MR. COCORAN: Among other things, your
21 Honor. The photographs of the building itself
22 and as well as photographs of the cartons, once
23 Mr. Colgan identifies them.

24 THE COURT: Any objection to offering
25 them in evidence at this time?

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2 MR. MATALON: I have none. Mr. Cocoran
3 showed them to me before we started the hearing
4 and I had no objection at that time and I have
5 no objection at this time.

6 THE COURT: Fine.

7 THE CLERK: Government's Exhibit 1-A
8 thru K inclusive received in evidence.

9 BY MR. COCORAN:

10 Q Agent Colgan, looking first at Government's
11 Exhibit 1-A thru 1-I--

12 THE WITNESS: Do you want to see them?

13 THE COURT: While you're talking about
14 them.

15 THE WITNESS: Do you want to look through
16 them?

17 Q Would you, please, look through these
18 photographs and indicate whether or not they are
19 the actual premises of 139-11 95th Street as they
20 appeared on February 19th, 1975?

21 A Yes, they are.

22 Q Do you know when those particular
23 photographs were taken?

24 A I believe they were taken on February 20th, 1975,
25 the next day.

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Q Is there any difference at all with regard to those photographs as the premises it appeared to be on the 20th as they appeared on the 19th?

A As far as the physical structure, no.

Q What about the interior of the premises?

A Well, by the 20th we had removed 633 cartons of merchandise from that building so therefore there are some changes where some boxes are shown in the photograph.

THE COURT: So none of the 633 cartons appear on that photograph?

THE WITNESS: No. We didn't have a camera on that day.

BY MR. COCORAN:

Q You say you approached the premises. Approximately what time was that?

A Again, some time after 12:00 o'clock, but not much after 12:00.

Q Who was with you at the time?

A At the time we approached the premises was just Agent Dowd and myself.

Q And when did you first make the observation you referred to earlier, that is, the markings on the carton?

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A As I was standing outside the premises of the address.

Q Were you able to look at the premises yourself from the street?

A Yes. It was what we call a two-truck day door opening.

Q As is indicated on the Photograph, Government Exhibit 1-A?

A Yes, it is.

Q Can you indicate to the Court using the photographs where you first observed cartons as you approached these premises?

MR. MATALON: May I see where he is pointing to?

THE COURT: Yes, certainly.

First indicate in any one of those photographs approximately where you were standing when you observed those cartons.

Do you have a marking pen?

THE WITNESS: Yes.

Here is a vehicle parked--it's an east-west street--it's a vehicle parked in approximately the northwest corner of this building. I was coming from the west to the east with

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2 Agent Dowd and as I got to just a view within
3 the opening I was able to see clearly into the
4 building, into this area here.

5 THE COURT: Wait just a minute.

6 The first photograph you marked is which
7 exhibit?

8 MR. COCORAN: Government Exhibit 1-A.

9 Q Put your initials where you were standing
10 when you first made your observation, sir.

11 A Here.

12 Q That would be outside the building.
13 Is that correct?

14 A Yes.

15 THE COURT: And the X you marked on 1-A
16 is the approximate location of the rear bumper
17 of the vehicle that was parked there?

18 THE WITNESS: Not really, your Honor.
19 This would be the location of the second agent,
20 Agent Dowd who was with me.

21 THE COURT: That's what the X means?

22 THE WITNESS: Yes. I was slightly ahead
23 of Agent Dowd. I was on the outside of the
24 sidewalk which perhaps gave me somewhat of a
25 better view at this point into the building.

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2 THE COURT: Is this sidewalk in front of
3 the bay shown in the various photographs here?
4 Is that a public sidewalk?

5 THE WITNESS: Absolutely, your Honor,
6 sidewalk on 95th Avenue.

7 THE COURT: You were going to indicate
8 where the cartons were in one of the other
9 photographs?

10 THE WITNESS: Yes, your Honor.

11 As I was just able to look into this
12 building, in my way into the building this
13 photograph shows the view I had.

14 THE COURT: And that was which number?

15 MR. COCORAN: Government's Exhibit 1-D.

16 BY MR. COCORAN:

17 Q Agent Colgan, does this in fact corr-
18 espond to Exhibit 1-A as it appears on the outside of
19 the building?

20 A Yes.

21 Q So this area in Government Exhibit 1-D
22 is immediately inside the door. Is that correct?

23 A Yes.

24 Q And visible from the street?

25 A That's correct.

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Q What kind of a day was it, sir?

A It was a clear day. I believe the sun was out and it was rather mild for February.

MR. MATALON: What was that?

THE WITNESS: It was a nice day for February.

Q Were the lights on in the building?

A I believe they were, but as you can see from the photographs, the light for me outside made it for me not totally bright on the inside.

Q Would you mark on Government Exhibit 1-D where exactly the cartons you referred to would be?

A There were a number of cartons approximately five to eight of the cartons identical to that on the table that were sitting along that particular area in this photograph..

MR. MATALON: May I see?

THE COURT: Let the record show the witness has marked three parallel lines on Exhibit 1-D to show the approximate location of some of the cartons which he observed.

How many cartons would you say you saw within the vicinity of those three parallel lines you saw on Exhibit 1-D?

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2 THE WITNESS: I believe I stated I saw
3 approximately five to eight of the cartons.

4 THE COURT: Five to eight out of approx-
5 imately 633?

6 THE WITNESS: I had not seen the others
7 at that point.

8 BY MR. COCORAN:

9 Q You testified, Agent Colgan, that you
10 had been past this premises in your search prior to the
11 19th and that is on the 18th of February. Is that
12 correct?

13 A Yes.

14 Q And was the bay door opened on the 18th
15 of February?

16 A Yes, it was.

17 Q And in what direction did you proceed
18 past the building on the 18th?

19 A On the 18th I was proceeding from the west--
20 I'm sorry, from the east to the west as I walked by.

21 Q You were on foot at the time?

22 A Yes, I was.

23 THE COURT: That would be right to the
24 left in Exhibit 1-A?

25 THE WITNESS: Yes, your Honor.

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BY MR. COCORAN:

Q As opposed to the direction you were coming in the 19th. Is that correct?

A That's correct.

Q And the bay door was open on the 18th?

A That's correct.

Q Were you able to make any observations inside the premises on the 18th?

A No, I did not.

On the day before the 18th I was walking, as I said, west. It was in late afternoon with a strong winter sun and I did not have sunglasses on. I did look into that bay door and I did observe a light on in the rear of this particular bay area. I did observe an individual I believe in that particular lighted area and proceeded to keep on walking.

Q So you didn't locate any of the stolen goods on the 18th?

A I didn't really look at all.

Q And then when you approached on the 19th prior to making your observation in the bay area of 139-11 95th Avenue you were unaware at that time that the goods were in that location. Is that correct?

A Absolutely.

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2 MR. MATALON: I object to that question.
3 It's a leading question and it calls for a yes
4 or no answer and it contains much facts which
5 should be elicited from the witness in another
6 manner.

7 THE COURT: I will let it stand.

8 Q Could you indicate to the Court, Mr.
9 Colgan, what--which markings you observed on the cartons
10 you first noticed from the street on the 19th?

11 A The first markings on the cartons that I
12 observed was the large red diamond with the letters
13 MIC within the diamond which is significant to the
14 stolen merchandise.

15 On a second carton or another carton in this
16 row that I was observing I saw the words in red
17 letters, Franciscano, Brazil.

18 MR. COCORAN: At this time, your Honor,
19 I would ask that Government Exhibit 2 be
20 marked for identification, and if there is no
21 objection, in evidence.

22 THE CLERK: One box marked for identif-
23 ication as Government's Exhibit 2.

24 (Both counsel confer with each other out
25 of the hearing of the court reporter.)

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2 MR. MATALON: If your Honor pleases, I
3 am told by the U.S. Attorney this is not the
4 condition of the carton as it looks now, all
5 deformed and discolored, I should say. And
6 based on those grounds I will object to the
7 admittance of evidence unless he can establish
8 this is the condition that the carton was in at
9 that time.

10 MR. COCORAN: Your Honor, I only asked
11 it be marked for identification at this point.

12 THE COURT: It has been marked for
13 identification.

14 BY MR. COCORAN:

15 Q Agent Colgan, would you step down and
16 look at Government Exhibit 2, please.

17 (The witness steps down.)

18 Q Have you seen that carton before?

19 A Yes, I have.

20 Q When did you first see that carton?

21 A This would be one of the cartons I observed
22 in 139-11 95th Avenue.

23 Q Does this carton bear any markings?

24 A My initials, P.F.C, appear on the top of this
25 carton and dated February 19th, 1975.

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THE COURT: That is one of the cartons that was there?

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THE WITNESS: Yes, your Honor.

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BY MR. COCORAN:

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Q Agent Colgan, can you tell us whether or not the carton is the same condition as you observed it on February 19th, 1975, in that premises?

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A No, it is not.

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Q Can you explain the change of the condition?

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A The reason for the dark markings on that carton is due to the silver nitrate used in attempts to obtain fingerprints from cardboard material. It leaves a stain that is indelible to the point that it doesn't even come off your hands for at least two to three weeks.

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Q Would you describe the carton as it appeared prior to putting it through the fingerprinting process?

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A Yes.

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The area where the lettering and the red diamond and other markings would be was initially a white sheet of paper with contrasting colors fairly easy to read.

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THE COURT: That would be the white, roughly the color of the paper on the upper right hand corner of the paper we are looking at, of the side we are looking at?

THE WITNESS: Yes, your Honor. And that's somewhat dulled.

BY MR. COCORAN:

Q And, Agent Colgan, is the same true with regard to the bottom of this carton where it's indicated, Brazil, Franciscano?

A That's true also.

Q At this time I show you Government's Exhibit 1-J and K in evidence and ask you if you can identify those photographs for the Court.

A Yes, I can.

These are photographs taken of a larger portion of the load that we removed from 139-11 95th Avenue.

Q And those photographs were similarly taken the following day on February 20th?

A Yes.

Q And do those photographs better represent the original condition of the cartons you found at 139-11 95th Avenue?

A Yes.

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MR. COCORAN: Perhaps the Court would like to see these photographs.

THE COURT: If we will be marking them in evidence.

MR. COCORAN: They are already in evidence.

THE COURT: They were part of the originals?

MR. COCORAN: Yes.

THE COURT: Where were these photographs taken?

THE WITNESS: When we removed the stolen load from the premises, your Honor, at 135-11 95th Avenue, we took it to a secured area at St. Johnsbury Trucking Company and the next day, the 20th of February, we unloaded the entire tractor-trailer and attempted to obtain fingerprints from a number of cartons. So these photographs were taken at a secured area at St. Johnsbury Trucking on the 20th.

THE COURT: I see.

BY MR. COCORAN:

Q Would you indicate, Agent Colgan, on Government Exhibit 1-J and 1-K what marks you observed on the cartons when you approached the premises in question.

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A I observed the word Franciscano and within the red diamond the letters MIC and the customer name as it is here, Dunham, D-u-n-h-a-m.

I have another--on another carton I was able to observe the word Brazil and Franciscano in red lettering.

MR. MATALON: May we ask the witness to testify to where he was standing when he made these two observations he just spoke of?

THE COURT: Yes.

Can you answer that question?

MR. MATALON: Was he still on the street at that time? That's what I would like to know.

Q Were those observations made from the point you indicated you were standing on Government Exhibit 1-A?

A Yes, they were.

MR. MATALON: That's on the street?

MR. COCORAN: That's correct.

Q What occurred after you made these observations, Agent Colgan?

A At that point I asked Agent Dowd to just mention to the third agent who was sitting in the car at that time to radio the other agents who we presumed were

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still in the general area, but on either a lunch break or other investigations, to contact them and advise them that we had found the stolen shipment and the address of where they were to come and assist us.

Q And what did you do then?

A Well, I paused for a few seconds there while Agent Dowd went to the car and informed the third agent. And then he came right back to me and we proceeded; both of us, into the building at 139-11 95th Avenue.

Q Did you encounter anyone else in that premises at that time?

A We entered the building and looked for some person to ask who was the manager, owner of that building. And we saw two men, one behind the glass enclosure in the rear of the bay section and a second man on the outside of that enclosure, apparently in conversation. And we approached these two gentlemen.

Q How did you enter the building, Agent Colgan?

A To the best of my recollection there is only one way to this building and that is through the open bay door.

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Q Were there any vehicles in the bay at the time you entered?

A No, there was not--I stand corrected, yes, there was, a small coffee lunch truck parked inside.

Q And where was that located, sir?

A That was parked on the extreme left as you look in and walk into the building, quite out of the way of the general bay working area.

Q And what did you do once you entered the building?

A We approached these two gentlemen that we could see, asked them both at the same time--I was the one who asked the questions--as to who was the owner of the building.

Q You say "we approached." Who else was with you?

A Agent Dowd and myself approached the two gentlemen.

Q Agent Dowd had rejoined you at this time?

A Yes.

Q Get any response from either individual?

A Yes. The man behind the glass partition stated what I thought was, "I'm the owner."

At that point he left the general area of the

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glass partition and went to a more or less side door to come out to the general bay area and joined the second gentleman as well as Agent Dowd and myself.

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Q Can you indicate on any of those photographs were you encountered these individuals?

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A Government's Exhibit 1-I is a good representation of where myself and Agent Dowd were standing.

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Q And that would be looking at those photographs, that would be in the rear of the bay area. Is that correct?

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A Yes. The bay area would be directly in here and these--this would be the window glass partition I was talking about.

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Q And you indicated one individual was inside the glass partition and one was outside. Is that correct?

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A Yes.

Q And the individual on the inside of the glass partition joined you on the outside?

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A Yes, he did.

Q What occurred at that time?

A This individual identified himself as Mr. Irving Haimson and my question initially was, was he the owner.

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Q Did you identify yourself?

A Yes, right away. I explained to him I was an agent with the Federal Bureau of Investigation and I showed him my credentials.

Q Did you have a conversation with Mr. Haimson at that time?

A I asked him if he was the owner and at this time he said he was not. I misinterpreted him perhaps on the first question I asked him.

Q What did he indicate at that time?

A He indicated to me he was the renter of the building and he rented it, I believe, from a real estate company.

And my next question to him was, did he rent the entire building. And he said yes, he did.

At which time I advised him of the purpose of my presence there, that being that I had observed from the street a quantity of cartons that bore markings I knew to have been stolen from a truck hijacking.

I immediately asked him if he would consent to a search of these premises and also advised him at that point that he did not have to consent to a search, but because of his constitutional rights to demand a search warrant he could demand one.

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Q And what, if anything, did Mr. Haimson say in response to that?

A Mr. Haimson just stated he understood the constitutional rights to demand a search warrant, however, that wouldn't be necessary and that he would consent to search the premises.

Q And what did you do at that time, sir?

A At this time Agent Dowd left me and proceeded to the second individual who was standing nearby and Mr. Haimson and I proceeded over a few feet to the vicinity of the cartons that I had observed from the street.

Q Did you make any determination at that time as to whether the cartons in question were in fact stolen from St. Johnsbury Trucking Company on February 13th, 1975?

A Yes. I proceeded over to the few cartons I had observed from the street with Mr. Haimson escorting me. I took a good look at the cartons, at which point I was able to observe the number LB040.

And at that point I was positive of my identification of the stolen merchandise.

Q Did you then conduct a search of the remaining premises?

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2 A I believe I first asked Mr. Haimson if he had
3 any more of these cartons and he stated, yes, they
4 are all right here, pointing to a rear section of
5 this building.

6 At which time I looked up and for the first
7 time I saw a large quantity of these cartons.

8 Q Approximately how many of these cartons
9 did you find in the premises 139-11 95th Avenue on
10 that day?

11 A An inventory told us there was 633 cartons in
12 Mr. Haimson's premises.

13 Q That was the entire stolen load?

14 A The entire load.

15 MR. COCORAN: At this time, your Honor,
16 I move Government 2 in evidence.

17 THE COURT: Do you still object, Mr.
18 Matalon?

19 MR. MATALON: No objection.

20 THE CLERK: Government's Exhibit 2 received
21 in evidence.

22 Q By the way, Mr. Colgan, you indicated
23 you entered the premises through the bay area..

24 Would you indicate on Government's Exhibit
25 1-D how or where you were as you approached the glass

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enclosure?

A As depicted in 1-A and in 1-D, Government Exhibits, to proceed directly into the building through the bay door would have required a jump of approximately three feet. So instead of going up this three foot ledge we proceeded just a few feet more over to the easterly side of the building where it's an easy step up to the platform area.

THE COURT: You are now pointing to Exhibit 1-D?

THE WITNESS: Yes, your Honor.

THE COURT: You stepped up in the area near the brick wall shown in that photograph?

THE WITNESS: Yes, your Honor. It seemed to be the most expeditious way into the building.

BY MR.COCORAN:

Q Onto the platform?

A Onto the platform, en route to the general area depicted in Government's Exhibit 1-I.

MR. COCORAN: Thank you.

I have no further questions.

THE COURT: Why don't we take our luncheon recess at this point and you will begin the cross

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2 right after lunch. And let's figure that will
3 be at 2:30. That will give us an hour.

4 (Luncheon recess.)
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AFTERNOON SESSION

THE COURT: Ready to cross-examine?

MR. MATALON: Yes.

THE CLERK: Mr. Colgan, please be advised
you are still under oath.

CROSS-EXAMINATION

BY MR. MATALON:

Q Mr. Colgan, you testified on direct examination that the information you received with reference to the approximate whereabouts of the contraband that you were looking for was in and about the Van Wyck Expressway and Atlantic Avenue. Do you recall testifying to that, sir?

A Yes, I do.

Q And then you stated that you were led to believe, were you not, by the informant that the contraband was located on the west side of the Van Wyck Expressway.

Can you tell me what led you to believe that?

A In answer to your question, the confidential information did not come in the terms of north, south, east or west. The information came in a general manner which indicated some blocks off Atlantic and Van Wyck. And it was initially presumed by myself and

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2 by other agents to be the west side. But so far as
3 the confidential source information being a specific
4 direction, it was not.

5 Q What made you presume it was on the
6 left side?

7 A To be quite frank, I don't recall the exact
8 words of the confidential source. Again, it was
9 my interpretation and other agents that it appeared
10 to be the west side initially.

11 Q You have no other information other than
12 the hazy recollection you have as to how you drew
13 to the conclusion or came to the conclusion that the
14 contraband was located on the west side of Van
15 Wyck Expressway?

16 MR. COCORAN: Objection. It's irrelevant,
17 the question of whether or not it's a consent
18 search here or not. How the agents came to be
19 in front of the premises of 139-11 95th Avenue
20 is not relevant to this hearing.

21 MR. MATALON: May I argue relevancy, if
22 your Honor please?

23 THE COURT: It isn't necessary because
24 essentially your question is argumentative of
25 every element that has already been established.

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2 It's true. He said he doesn't know precisely
3 or doesn't recall precisely what was said to
4 him. He made an assumption it's on the west
5 side and after he didn't find it on the west
6 side he said, gee, maybe I misunderstood and we
7 should be on the east side, so he went over.
8 So all the points you're trying to make I have.

9 Q Will you tell me, Officer, were you
10 familiar with this area prior to the time you received
11 the information from the informant as to the approximate
12 location of the contraband?

13 A I will answer your question the same way it was
14 asked.

15 I have been in the area, in that area, for the
16 past five years off and on and I am in a way generally
17 familiar with the streets, but do I know the area,
18 no.

19 Q You know it generally?

20 A I know how to get there, yes.

21 Q Have you ever conducted investigations in
22 that area prior to February 19th, 1975?

23 A Can you be more specific as far as area, what
24 streets we are talking about?

25 Q In or about the area of, let's say, 139-11

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95th Avenue in Queens.

A I have been in that area a number of times in the past five and a half years.

Q And that address I just gave you is located on the east side of the Van Wyck Expressway. Is that correct, sir?

A That's correct.

Q And the east side is the part furthest out going towards the Island. Is that correct?

A That's correct.

Q And when you initially started your investigation based on your presumption or however you got your information or however you drew your conclusion, you conducted your investigation on the west side which is the side closest to the City of New York?

A That's correct.

Q Now, sir, can you tell me what generally is located on the west side of the Van Wyck Expressway in and about VanWyck and Atlantic Avenue?

THE WITNESS: Your Honor, I can answer the question, but is it relevant?

THE COURT: There is no objection.

A The west side consists of Atlantic and Van Wyck,

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which is predominately commercial.

North of this intersection is a mixed area of both commercial and residential.

Q With reference to the commercial area, would you describe that area of commerciality as warehouses and storage houses?

A Yes, but it's mixed.

Q There are warehouses and trucking concerns on that side also?

A I don't know of trucking concerns.

Q There are warehouses?

A There are large buildings I assume to be warehousing facilities.

Q And with reference to the type of structure or the area located on the east side of the Van Wyck Expressway, would you describe that area?

A Somewhat the same.

Q All right.

Now, you say you received your information on the night of the 17th. Is that correct?

A To the best of my recollection, yes.

Q Officer, you prepared a report, did you not, for the Federal Bureau of Investigation; I believe it's called FD-302. I will show it to you, sir,

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2 and see if you can identify it.

3 (Handed to the witness.)

4 A Yes, I prepared that.

5 MR. MATALON: Would the Court please note
6 I received a copy of this report from Mr.
7 Cocoran and if you have the original, I will
8 work with the original, Mr. Cocoran.

9 MR. COCORAN: I don't have it.

10 MR. MATALON: Do you have an extra copy,
11 per chance?

12 MR. COCORAN: No, I don't.

13 Q And who dictated this report?

14 A Can I see it?

15 (Handed to the witness.)

16 Q Yes.

17 A I dictated that.

18 Q You looked at a certain part to determine
19 whether you dictated it?

20 A That's correct.

21 Q And what is the date you dictated that
22 report?

23 A The date is 2-21-75.

24 MR. COCORAN: I'm sorry, Mr. Matalon, I
25 do have an extra copy.

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2 MR. MATALON: Would you mind if the
3 witness works with this so I don't have to
4 stand on top of him?

5 MR. COCORAN: I gave you four pages?

6 MR. MATALON: That's right.

7 MR. COCORAN: Can we have this marked,
8 please, for identification?

9 MR. MATALON: Can I have this report
10 marked, report entitled--numbered FD-302 and
11 entitled Federal Bureau of Investigation which
12 this witness has identified?

13 THE COURT: At this point I will deem
14 it marked.

15 Have there been any other defendant
16 exhibits marked?

17 MR. MATALON: No.

18 THE COURT: We will deem it marked
19 Exhibit A for identification and we will
20 physically mark it shortly.

21 BY MR. MATALON:

22 Q Now, Mr. Colgan, did you at the time you
23 dictated this memorandum, which is marked Defendant's
24 1 for identification, did you dictate any part of it
25 from any notes that you wrote down on any pad of paper?

1 A Yes, sir.

2
3 There would have been part of this document
4 dictated from notes and that part being simply Mr.
5 Haimson's background and description as contained
6 on--well, numbers 11 and 12 appear on the two pages
7 I am referring to.

8 Q You mean the third page?

9 A Second and third page.

10 Q I see.

11 What about the narrative you were given
12 on Page 1. It says MRS. I assume you mean Mister?

13 A The actual S on the original seems to have been
14 erased.

15 Q All right.

16 What about that narrative. Where did
17 that come from?

18 A That's a narrative from recollection of that
19 day, that day being February 19th, 1975.

20 Q Mr. Colgan, isn't it customary when you
21 go on an investigation and you proceed to areas of
22 the investigation and you make certain findings, that
23 you record these findings on some kind of memorandum?

24 A Not necessarily, no.

25 Q Did you do it on this day? Did you make

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any reference on any memorandum with reference to
your findings other than Mr. Haimson's family tree?

A Not that I recall.

Q You have no recollection?

A I don't recall making any other notes as you're
indicating other than what I already told you, sir.

Q So your recollection, sir, if I may
restate it, is that you dictated this memorandum from
your recollection without using any notes except for
that portion you indicated concerning the vital
statistics on Mr. Haimson itself concerning family,
et cetera?

A The narrative was dictated just two days after
the incident.

Q I know that, sir.

MR. MATALON: I want you to repeat the
question.

THE COURT: Read it, please.

(The court reporter reads back the
requested portion.)

THE WITNESS: The answer is yes.

Q When you quoted the words "Franciscano,
Brazil," and enclosed the quotes, that was taken
from your memory then?

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A That's correct.

Q And when you quoted the words or the letters, "LP: 040 markings," that was taken from your memory?

A That's correct.

Q Not from any notes?

THE COURT: Is that LP or LD?

MR. MATALON: It reads LP in the memorandum, your Honor, unless I am reading it wrong?

THE WITNESS: That's correct.

Q And when you referred to the various dates such as February 13th on the first page of the memorandum, that was taken from your memory and you used no notes to refresh your recollection when you dictated that memorandum?

A That's correct.

Q And similarly is it your testimony when you dictated the address, 139-11 95th Avenue, Queens, New York, that was dictated from your memory and without the use of any memorandum that you had before you?

A That's correct.

Q So then your testimony here today, if I

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may ask you, sir, is from your best recollection and you used no memorandum here, or did you use any memorandum to refresh your recollection before you testified on direct examination?

A As of today I reviewed my FB: 302 to refresh my recollection.

Q Yes.

Is that the only memorandum you used to refresh your recollection?

A Yes, sir.

Q And, sir, is there anything in that memorandum that says that you were on these premises on February 13th and that you couldn't look in because the sun was in your eyes?

A To the best of my knowledge there is nothing in my memorandum that says that, no. I honestly read it quickly.

Q Well, read it again.

(Whereupon there was a pause in the proceedings.)

A I don't see anything in there indicating February 18th.

Q Or about the sun being in your eyes?

A This is a document that purports to be an

1
2 interview of Mr. Haimson.

3 Q I am asking you if there is anything in
4 that--

5 A I am answering your question.

6 Q No. My question is simple.

7 MR. COCORAN: Objection, your Honor.

8 MR. MATALON: I direct the witness to
9 answer the question, your Honor.

10 THE COURT: Mr. Colgan, it would take
11 much less time without your volunteering. His
12 only question was: Does Exhibit A for ident-
13 ification in front of you contain any reference
14 to the sun being in your eyes on the 18th?

15 THE WITNESS: No, it doesn't, your Honor.

16 THE COURT: All right.

17 You did make a comment though that I
18 want to be clear of. You said this document--
19 I think you meant Exhibit A--purports to be an
20 interview with Mr. Haimson?

21 THE WITNESS: That's correct, your Honor.

22 THE COURT: The 302 report is simply a
23 report of an interview?

24 THE WITNESS: It's a synopsis of an
25 interview.

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2 THE COURT: It's not a report of the
3 total investigation?

4 THE WITNESS: That's correct, your Honor.

5 THE COURT: That is correct, it is not?

6 THE WITNESS: It is not an overall--

7 THE COURT: Okay, fine.

8 BY MR. MATALON:

9 Q To carry your Honor's inquiry one step
10 further, it's your testimony you didn't make a
11 written memorandum, you didn't anyway, with reference
12 to your overall investigation?

13 A Do you want to repeat the question and rephrase
14 it?

15 THE COURT: Is there any memorandum as
16 to your overall investigation?

17 THE WITNESS: I did a report, your Honor,
18 on the overall investigation.

19 BY MR. MATALON:

20 Q Do you have that report with you here
21 today?

22 A No, I do not.

23 Q Did you read that report before you came
24 here today to testify?

25 A No, I did not read the entire report.

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Q Did you read the entire report?

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A I read the report of the interview with Mr. Haimson.

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Q So this report of the interview with Mr. Haimson is part of the overall report, is that it?

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A There are other pages in the report that this document was in.

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Q Well, I asked you before if you ever made any memorandum or any other report and you testified no and now you testified there is another report?

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A Memorandum to me as I interpreted your question is notes I might have made on February 19th. And there were no other notes or memoranda for that date.

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A report? Yes, there was a report on the investigation.

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MR. MATALON: If your Honor please, if I understand the record, when I made my motion for discovery--and you correct me if I am wrong, Mr. Cocoran--Mr. Cocoran was supposed to supply me with all reports that were available. And I only got four pages of a report that is a part of the report, your Honor.

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MR. COCORAN: It's not correct.

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MR. MATALON: I said correct me if I am

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2 wrong.

3 MR. COCORAN: This report was turned over
4 as per Rule 16. And I have not indicated to
5 Mr. Matalon I have turned over all 3500 material.
6 That material is turned over prior to trial
7 after direct testimony. It's our policy to
8 turn it over prior to that to avoid delay during
9 the trial. But I have not turned over 3500
10 material today.

11 MR. MATALON: If there is 3500 material
12 which I don't know other than the four pages
13 I have received, which is relevant to this
14 hearing, then I think I am entitled to that
15 information.

16 MR. COCORAN: The law is quite clear
17 you are not, Mr. Matalon. That material cannot
18 be ordered to be produced until after direct
19 examination at trial. The rules are clear and--

20 THE COURT: Are you saying that 3500 has
21 no application in a suppression hearing?

22 MR. COCORAN: Yes, sir, as I understand
23 it.

24 THE COURT: I think the Second Circuit
25 came down with an opinion in the last three--

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2 certainly within the last two months, quite to
3 the contrary.

4 MR. COCORAN: If they did, I have missed
5 that opinion.

6 THE COURT: Assuming my recollection is
7 correct and it does apply to the suppression
8 hearing, and do you have any material in
9 connection with the cross of this witness?

10 MR. COCORAN: Yes, I understand 3500
11 material to be statements of this witness which
12 he has testified about.

13 THE COURT: How about the broader scope
14 of Brady v. Maryland?

15 MR. COCORAN: I have no Brady material
16 in this matter, your Honor, and had I had any
17 Brady material it would have been turned over.

18 THE COURT: And would you consider an
19 interview Brady material, something which would
20 tend to establish merit for the claims of
21 suppression?

22 MR. COCORAN: Certainly. Anything along
23 those lines. But we are talking about something
24 quite different when we discussed 3500 material.

25 THE COURT: Well, some 3500 material is

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Brady material.

MR. COCORAN: The obligation is somewhat separate. The obligation to turn over Brady material doesn't arise out of 3500.

I have nothing that would aid the defendant or which is exculpatory. When the Agent is talking about an overall report he is talking about reports with numerous witnesses and witnesses somewhat connected with this. They are put together in one report and the part of the report turned over relates to Mr. Haimson. The other individuals are tangential. They relate to the case only as far as the people working for the company and they were questioned as to their knowledge of the goods. They don't relate to Mr. Colgan's activity for that day. So it would not reflect to any fact as to the matters under consideration.

MR. MATALON: That's not what the witness testified to. He said he read parts of the report which indicated and led me to the implication he read parts of reports that aided him in his testimony.

THE COURT: I didn't hear him say that.

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2 MR. MATALON: I am operating in the dark.
3 Perhaps your Honor can go over the material and
4 determine which is relevant to the suppression
5 hearing and which is not relevant to the
6 suppression hearing.

7 THE COURT: In terms of what the witness
8 has testified to and from, he said the only
9 report that he refreshed his recollection from
10 for the purposes of testifying here today was
11 the 302 on Haimson. I think that's what he said.

12 THE WITNESS: That's exactly right, your
13 Honor.

14 MR. MANALON: What prompted this whole
15 discussion is that he made a further remark
16 saying that he read parts of another report.

17 MR. COCORAN: I don't believe so, your
18 Honor.

19 MR. MATALON: That's what I believe
20 prompted my argument.

21 THE COURT: Did you read parts of another
22 report?

23 THE WITNESS: The only report I know of
24 is the report that Mr. Cocoran and I read this
25 morning.

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2 THE COURT: Which is already marked
3 as Exhibit A.

4 THE WITNESS: Yes. And I don't recall
5 seeing another document on this case, your
6 Honor.

7 MR. COCORAN: To the extent this report
8 reflects on any facts on the part that Mr.
9 Colgan had testified to, it would be contained
10 on the 302 or interview report of Mr. Coin
11 (phonetic spelling) who was the Director of
12 St. Johnsbury Trucking Company who indicated
13 the truck was in fact stolen of Mr. Auciello
14 who was the truck driver who indicated the
15 truck was stolen from him. And there are no
16 other pages in this report other than what was
17 already turned over to Mr. Matalon, your Honor.

18 THE COURT: Would you mark the report and
19 give it to me now and let me peruse it while
20 the hearing goes ahead?

21 MR. MATALON: Do I then have the represent-
22 ation of the U.S. Attorney that there is nothing
23 in that report which indicates what his activities
24 or what any other agent's activities were for
25 their investigatory period, I think from either

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2 the 17th or the 18th and the 19th?

3 THE COURT: Insofar as it bears on this
4 location?

5 MR. MATALON: Yes, on this location,
6 your Honor.

7 MR. COCORAN: That's correct.

8 THE COURT: And I will verify it.

9 MR. MATALON: Thank you, your Honor.

10 THE CLERK: A several page document marked
11 for identification as Government's Exhibit 3.

12 MR. MATALON: May I proceed, your Honor?

13 THE COURT: Yes, please.

14 BY MR. MATALON:

15 Q I take it then, Mr. Colgan, you view
16 this FP302, which is marked before you as Defendant's
17 1 for identification, solely as an interview between
18 yourself and Mr. Haimson on that day of the 19th?

19 A Yes.

20 Q Is that correct?

21 A Yes.

22 Q So that all the testimony you gave this
23 morning with reference to the confidential informant
24 and with reference to the perusal or the search in
25 the area on the 18th and what occurred on the 19th,

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2 all up to the time you interviewed Mr. Haimson,
3 you're testifying that from memory?

4 A That's correct.

5 Q And it's also true--may I ask you this
6 question one more time and I may be repetitive--that
7 you used some memoranda to refresh your recollection
8 as to those events that occurred on the evening of
9 the 17th, February 17th, up to the time you interviewed
10 Mr. Haimson?

11 A That's correct.

12 Q And those events occurred either on
13 February 17th, the day of February 18th and the
14 part of the day of February 19th, 1975, which is
15 approximately a year and a half ago?

16 A Okay.

17 Q Is it a fact?

18 A I agree with you.

19 Q It's a fact?

20 A It's about eighteen months.

21 Q Is there any Federal Bureau of Investi-
22 gation regulation that requires you to make a
23 memoranda of your investigation?

24 A Just a report.
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Q Just the final report?

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A That's correct.

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Q What time did you get your information on the evening of the 17th?

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A I don't recall.

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Q You have no recollection of that?

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A No, sir. As far as time, no, I don't know exactly or even the approximate time on that date.

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Q You have no recollection at all?

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A Not of the time, no.

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Q Mr. Colgan, I remind you remembered a lot of other intricate facts.

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MR. COCORAN: Solely argumentative, your Honor; not relevant whatsoever.

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THE COURT: Sustained.

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Q Would you say it was in the early evening?

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A I can't say that.

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Q Would you say it was in the late night?

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A I don't recall.

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MR. COCORAN: Objection. Asked and answered, your Honor.

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THE COURT: Overruled.

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Q Is it possible you received that

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information early in the morning on the 17th?

A I don't recall.

Q Is it possible?

A I don't know. I can't recall when I received that information other than to be positive that it was on the 17th of February.

Q Do you have any recollection of going out on this investigation on the 17th of February?

A I believe I did go out on the 17th of February on this case.

Q Now, this is from your memory now?

A Yes.

Q And was that just in reference of interviewing the informant?

A No, it was not.

Q This was after you got the information from the informant you went out?

A That I don't recall.

Q Well, where did you go on the 17th?

A I can only tell you that my procedure on a case like this is to contact company officials, both the consignee and the trucker, therefore, I can pretty assuredly say that I did work on this case on the 17th of February.

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Q I am not talking about contacting the trucker or consignee. I am talking about investigating the area where the goods are located. Did you go out on the 17th?

A I don't recall going out in an area looking for these goods on the 17th.

Q All right. That's what I want to know. Now, before you went out on the 17th-- on the 18th, that's the next day, correct?

A Yes.

Q Where did you leave from?

A I left from my office.

Q Where?

A 201 East 69th Street, in Manhattan.

Q And you stated you left with eight or ten other agents?

A That's not correct.

Q I'm sorry, what is your recollection of the testimony?

A Are we referring to the date of February 18th?

Q That's right.

A I was by myself.

Q I recall now.

That's the day you went out on the 18th

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and conducted an investigation all afternoon and
you drove around alone?

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A Yes.

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Q Is that correct?

6

A Yes.

7

Q I see.

8

And where were you driving?

9

A In the general area, both east and west of the
Van Wyck Expressway and Atlantic Avenue.

10

11

Q And where did you drive past first,

12

the east side or the west side?

13

A The west side.

14

Q I see.

15

And how long did you stay on the west

16

side?

17

A Approximately two to three hours.

18

Q And at any time did you park your car

19

and stop your car and get out of your car and go
into buildings?

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21

A On the west side?

22

Q Yes.

23

A Yes, except the last part of your question, I
did not go into any buildings on the 18th.

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25

I did drive around. I didn't get out of the car

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2 and walk around, but I did not go into any buildings
3 on the 18th in regard to this particular case.

4 Q In regard to any of the buildings you
5 walked around on the 18th, that you walked around
6 yourself, were there any open buildings similar to
7 the building in question here?

8 A Yes, there was.

9 Q And did you peruse inside from the outside?

10 A No, I did not.

11 Q Did you look into the buildings at all?

12 A I presume I would have looked in and kept on
13 walking.

14 Q You were doing an investigation and that's
15 what you were there for?

16 MR. COCORAN: Objection, your Honor.

17 I asked defense counsel not to argue with the
18 witness.

19 THE COURT: I will permit this, but it
20 doesn't help to argue with him.

21 MR. MATALON: I don't mean to be argu-
22 mentative, your Honor. I'm sorry if it sounds
23 argumentative.

24 Q You were there to do an investigation,
25 were you not, on the 18th?

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A I think the better term would be street investigation. I was just trying to make my own observations.

Q You were there in the capacity of an FBI Agent, were you not?

A Yes.

Q And you were looking there for contraband goods which were reported hijacked on the 13th, were you not?

A Counselor, I was on the street. If you want to call that investigation, and looking for stolen goods, yes, I was.

Q You weren't socializing with anybody, you were on official duty. Is that correct?

A Yes.

Q Let's establish that.

A Yes.

Q As a matter of fact, when you went out on the 18th you had already spoken to the owner of the goods and you have the markings of the cartons. Is that a fact?

A I had the markings of the cartons. I don't recall if I spoke to the owner on that day or not.

Q Well, you had the markings you testified

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about this morning?

A Yes.

Q Is that correct? About the letter and numbering and the diamonds and the LP 104, whatever the numbers were? You knew about that?

A Yes.

Q And how did you have that information? In a folder or how did you keep it?

A I couldn't state that other than I knew what the markings of the cartons were.

Q Did you have a copy of those with you?

A I don't recall.

Q It's your testimony then that you don't remember whether or not you had those markings with you?

A Counselor, I have done this type of investigation before and I am familiar with certain markings on imported and exported documents and I have the markings in memory.

Q You had them in memory on the 18th?

MR. COCORAN: Objection, your Honor.

MR. MATALON: I will want to get this clear.

MR. COCORAN: I object to relevancy.

1
2 The scope of the hearing is whether or not the
3 goods were properly received. There is no
4 question Mr. Colgan found the goods and seized
5 them on the 19th. How he got to the premises,
6 I don't know. He must have known the markings
7 beforehand.

8 THE COURT: Mr. Cocoran, your direct
9 examination went into a little more than that.
10 I think for the purposes of credibility if
11 nothing else Mr. Matalon is entitled to inquire.
12 But it doesn't help Mr. Matalon to repeat his
13 answers and questions. I have gotten to the
14 point where I understand it.

15 You are not developing any new facts to
16 help me here.

17 And while we are interrupted there is
18 one page in this report which I think probably
19 should be brought to the attention of Mr.
20 Matalon. I don't think it adds anything to what
21 we already know, but it does bear upon the events
22 of going to the premises. It's really a
23 summary statement of what the witness has
24 already testified to.

25 Unless there is some reason it shouldn't,

1
2 I would direct you to furnish it.

3 MR. COCORAN: All right, your Honor. I
4 have no objection to turning this over, your
5 Honor. I don't have a copy of it at this time,
6 your Honor.

7 THE COURT: I can have a copy made while
8 Mr. Matalon continues here and it will be ready
9 in a couple of minutes.

10 THE CLERK: Mark this as Exhibit 3A?

11 THE COURT: Make the copy and mark the
12 copy.

13 Proceed, Mr. Matalon.

14 BY MR. MATALON:

15 Q Up to February 13th, 1975, had you
16 ever conducted investigations with reference to
17 hijacking?

18 A Yes, I have.

19 Q And prior to February 18th, 1975, when
20 you conducted those investigations did you secure
21 from the owner of the shipment the markings on the
22 cartons?

23 A We are talking about these cartons?

24 Q Not these cartons, other investigations.

25 A Yes, I have.

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Q And when you went out on investigations is it your usual practice to take these markings with you?

A I sometimes did and I sometimes didn't.

Q And on this occasion you have no recollection?

A On this specific occasion I don't recall if I had the markings specifically with me, no.

Q When you went out on that date did you report to your superior where you were going?

A I don't recall.

Q You have no recollection of that?

A No, I do not.

Q When you came back that night did you tell your superior where you were?

A I don't recall.

Q Now let's get to the east side of Atlantic Avenue on the 18th, the east side of Van Wyck Expressway on the 18th.

If I recall your testimony, you testified facing this premise of 139-11 95th Avenue, the street runs east and west, if I recall. Is that correct?

A I believe it does, yes. I believe at that point it's a two-way street running east and west.

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Q So when you're facing the building you're facing to the north?

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A The building sits on the north side of the street.

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Q So when you're facing the building you're facing a northerly direction?

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A Yes.

9

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Q You accept that?

A Yes.

11

12

Q We can't argue about that factor.

13

What time on the 18th did you come to these premises?

14

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A It was in the afternoon. An exact time I can't give you. I don't recall other than to state that it must have been after 2:00 o'clock some time.

16

17

Q And you testified that you were walking from east to west, I believe?

18

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A Yes.

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Q In other words, facing the building, you were coming from the right side walking toward the left side facing the building?

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A As I understand your question, yes.

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Q Is that right?

A Yes.

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Q And at 2:00 o'clock, Mr. Colgan, do you know where the sun would be?

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A Again, from my recollection, it's February, the sun sets early and also in the wintertime the sun is very close to the earth and I do know the sun was very bright in my eyes as I was walking west. And again, I am presuming, because the sun was still in the sky, it was sometime in the midafternoon.

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Q Where was it? In the west, in the east, straight up? That's what I asked you.

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A West.

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Q It was west, in the direction you were walking?

15

A That's correct.

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MR. MATALON: May I have those pictures, please?

18

(Handed to Mr. Matalon.)

19

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Q I show you Government's Exhibit 1-A.

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23

Is it fair to say then you were walking from this direction, which is the right side of the picture, towards those markings you made on the left side of the picture?

24

A That's correct.

25

Q And that would be walking in a westerly

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direction and the sun was in the west at that time?

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A That's correct.

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Q Is that correct?

5

Now, you said you stopped at those
premises.

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A I don't believe I said that on the 18th.

8

Q You didn't say that?

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A No.

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Q Let me see what you said. Let me see
what my notes said.

12

THE COURT: He said he looked in as he
went by and saw a man and a light and continued
on.

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MR. MATALON: He said the sun was in his
eyes when he looked in.

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THE COURT: Yes. And he did say he
saw a light and an individual, I believe he
said, were his words.

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19

20

Proceed.

21

Q Now, you said, if I am correct, as you
walked by the bay door was open?

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A That is correct.

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Q And that is one door for both bays, it's
a one door for both bays. Is that correct?

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A I would consider that a double bay.

Q A double bay?

A Yes.

Q I see.

Now, when did you start to look inside there? When you were at what point inside the street on the 13th?

A I would have to say the middle.

Q The middle?

A Approximately. I don't recall.

Q And would you say, sir, you were standing in the middle and you are on the street, can you tell me how you looked inside, tell me what you did exactly?

A I never stopped walking. I merely turned my head, looked in and saw what I thought was a man in a lighted area and then kept on walking west.

Q When you turned your head to look in you were looking north then. Is that correct?

A Yes.

Q And the sun was not in the north?

A No, it was not.

Q And the sun was not in your eyes when you looked inside, was it?

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A No.

Q And was your vision obstructed in any way when you looked inside?

A Yes, it was.

Q By what?

A Simply the change of lighting.

Q I see.

And you say you didn't stop?

A No, I didn't.

Q And we have a warehouse here for a trucking concern with an open door and you didn't stop to conduct an investigation in any way to look inside?

A No, I did not.

Q And what were you doing there? Why were you there?

A I was there for the same reason I was on the west side of the Van Wyck.

Q And what reason was that?

A For attempting to perhaps locate a building that might be, for a building I was looking for that would store stolen merchandise.

Q You were looking for a specific building?

A No, not a specific building.

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Q Why wasn't this building a suspect for the repository of the stolen merchandise?

A Because at this time I was still operating under the position that the merchandise according to the information was supposed to be on the west side of the Van Wyck.

Q But you already discredited that you were now on the east side.

A I haven't totally discredited anything.

Q What were you doing on the east side?

A Again, to determine whether that area on the east side of the Van Wyck Expressway resemble the west side, which it did.

Q In fact, when you passed on the 18th you looked inside and you saw cartons on the same place you saw them on the 19th and you identified them with those markings and you knew they were there on the 18th?

A Counsel, if I knew--

THE COURT: Just answer yes or no.

Q Isn't that a fact?

A No, I did not know it was there.

Q When you looked inside all you saw was a man standing there?

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A That's what I testified to, yes.

Q I know you did.

MR. CCCORAN: Objection, your Honor.

MR. MATALON: I apologize to the Court
and withdraw the question.

Q Did you see any cartons inside when you
went there on the 18th?

A No, I did not.

Q And how long did you say your observation
was facing in a northerly direction in the opening
of the double bay on the 18th?

A One second.

Q One second.

And you were doing an investigation?

A I was working.

Q Well, who do you work for?

A Federal Bureau of Investigation.

Q And what was your job?

THE COURT: Mr. Matalon?

MR. MATALON: Your Honor, he gives me
an answer he was working. I know he was working.
I'm sorry.

Q What else did you see, if anything, when
you looked inside that opening as portrayed in

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Government's Exhibit 1A on the 13th?

A Nothing.

Q Where did you see the man?

A The man was silhouetted against a lighted area in the rear and I can only state I assume I saw him because of the brightness of that particular area, his office.

Q You saw--

A The rest was dark because of the light.

Q Was the place lit?

A I don't recall on that day.

Q What do you mean it was dark because of the light? You mean the sunlight in your eye?

A Because of the sunlight in my eye--the sunlight in my eyes, me looking into a basically darkened area, the second I took the look in there on that day I only saw a lighted area with what I thought was a man.

Q Then would you then, sir, say, as an experienced investigator who has had five years with the Federal Bureau in this Department, would you say, sir, that you did not make a complete observation of the interior on that day when you walked past?

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A That's true.

Q And then you walked past and where did you go after that?

A I continued down the street and again just looked for buildings, which there is one next door, I believe, to Mr. Haimson's place that also could have been a possibility.

Q Did you say to yourself on that day after you walked past this place, 139-11 95th Avenue, and you made an observation for a second, which you agree was not a total observation or a good observation in accordance with your investigative procedures, turn around and go from west to east, to make another attempt to look inside?

MR. COCORAN: I am going to object to the question, the form of the question, and also the implication that Agent Colgan testified that that wasn't a good observation according to his procedures.

THE COURT: He said it wasn't a complete observation.

Objection overruled.

Did you turn around and look back the other way and look in?

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2 THE WITNESS: Your Honor, I honestly
3 don't remember. I don't recall if the car
4 was parked, if I walked back past it. I
5 honestly don't remember.

6 BY MR. MATALON:

7 Q Well, did you make a notation somewhere
8 or did you make an impression in your mind that it
9 would be a good idea to come back and look at this
10 building again?

11 A I don't recall.

12 Q But you did in fact go back there on the
13 19th?

14 A That's true.

15 Q And what time did you go there on the 19th?

16 A To the best of my recollection it was after
17 12:00, shortly after 12:00 o'clock noon.

18 Q And now you testified on direct that
19 when you think back on the 19th you were walking from
20 west to east. Is that correct?

21 A That's correct.

22 Q That's the one thing you didn't do on
23 the 18th. On the 18th you walked from east to west.
24 Isn't that true?

25 A That's correct.

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Q And when you walked past from west to east you said as you came to the opening and you were not inside yet, you identified cartons on the platform that bore the markings which were reported to you as the merchandise which was hijacked?

A On the 19th?

Q On the 19th.

Is that correct?

A That's correct.

Q And you also testified at that time that you immediately told your associate who was with you--there goes my glasses--Mr. Dowd, is it?

A Yes.

Q To go and tell the other agents to telephone or to radio that you spotted the contraband?

A That's correct.

Q Now, when you saw that on the 19th, there was no doubt in your mind, was there, that that was the contraband?

A No, sir.

Q And you say you saw five to eight cartons?

A That's my recollection.

Q How long was your observation on that day before you told Mr. Dowd to communicate with the

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other agent?

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A I would say a few seconds.

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Q What is a few seconds to you, Mr. Colgan?

5

A Perhaps five to ten.

6

Q And what else did you tell Mr. Dowd,

7

if anything, after you made that five or ten second

8

observation of that--of those cartons?

9

A You mean five or ten second observation?

10

Q Well, after that five or ten second

11

observation.

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A I just asked him if he would contact the other

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agents who had left the area or were leaving the area.

14

Q Did you at that time as part of that

15

conversation ever say to him that we better get a

16

search warrant to search the premises?

17

A No, I did not.

18

Q Did that thought ever enter your mind?

19

A Not at that particular time, no.

20

Q Did it at any time?

21

A When I was speaking to Mr. Haimson, yes, it did.

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Q At that time after you were in the

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premises already and identified yourself?

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A When I identified myself and I advised Mr.

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Haimson of his constitutional right to have a search

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warrant.

Q Up until that time it never entered your mind to get a search warrant?

A No.

Q And you never had any discussion with Mr. Dowd in that conversation after you made that observation about a search warrant? Mr. Dowd didn't say anything to you about getting a search warrant?

A To the best of my recollection, no.

Q Where was Mr. Dowd standing when you told him that?

A . When I told him?

Q When you told him to tell the other agent to radio the other agents?

A I believe as I testified in these photographs, to my recollection Agent Dowd was slightly behind me.

Q Was he by the X mark?

A Approximately the X mark.

Q And where was the other--

THE COURT: In Exhibit 1A.

MR. MATALON: You want to see it?

THE COURT: The X in Exhibit 1A.

MR. MATALON: Yes.

Q And where was the other agent parked?

- 1
2 A He would have been parked west of the building.
3 The exact spot I don't know.
4 Q That's the direction from which you came
5 in?
6 A Correct.
7 Q All right.
8 And you also testified, as I recall,
9 you observed no trucks inside, only a lunch wagon?
10 A Yes, I believe so.
11 Q And that bay had room for two trucks,
12 did it not?
13 A Yes.
14 Q Did you see anybody loading any cartons
15 on any trucks?
16 A No, I did not.
17 Q Did you see anybody destroying any cartons?
18 A No, I did not.
19 Q Did you state that--do you have a feeling
20 that you were in any kind of pending peril or danger?
21 A No, I did not.
22 Q Did Mr. Dowd reveal to you in any way he
23 was in some kind of danger?
24 A No, he did not.
25 Q Where in relation to the Eastern District--

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the Magistrate of the Eastern District--is this premises located?

A I would say this location might be approximately eight to twelve miles from here.

Q All right.

And how long would you say it would take you to get here from that location, on an afternoon, about 2:00 o'clock on February 19th, 1975?

A Depending on traffic, twenty to forty minutes.

Q All right.

And you had three men, yourself, Agent Dowd and another agent, I don't recall his name and I don't want to take any chances in mispronouncing it, with a P, if I recall, Pistone (phonetic spelling), was it?

A I believe that was the third agent, yes.

O The third agent.

MR. MATALON: May I have a minute your Honor, to review my notes?

THE COURT: Yes, you may.

(Whereupon there was a pause in the proceedings.)

THE CLERK: One page document marked for identification, that's Government Exhibit 3A.

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Q Now, if I recollect correctly, you testified on direct when you made this observation on the 19th from the street, you saw some cartons on the platform to the right facing the building, inside the building. Is that correct?

Maybe we can get a picture and we can identify it.

A I think that's correct. As I understand your question, that's correct.

Q Why don't you take a look at this photo, Government's Exhibit 1-E, and I ask you if this is the area.

A This is the area what?

Q Where the cartons were that you saw from the street from your markings in Government 1-A.

A Yes, this is generally the area.

Q Would you take a marker, please, and tell me where you saw the cartons on that day?

A I believe I did it on another photograph.

THE COURT: Yes. They were, I believe, Exhibit 1-D or 1-I.

MR. MATALON: Yes, I'm sorry.

THE COURT: Three parallel lines.

Q Let's work with Exhibit 1-D where that

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marking is.

And it's your testimony, if I recall, that you saw five to eight cartons?

A That's my recollection of the testimony.

Q And were they all--these cartons you saw, were they all similar in size--what is this identified as, Government Exhibit 2 in evidence?

A The 633 cartons were identical to that carton.

Q I didn't ask you that. I asked you with reference to the five to eight that you saw on this Exhibit 1-D. Were they the same size as you saw as this Exhibit here?

A Yes.

Q And then you volunteered all were that size?

A Yes.

Q And you consider five to eight cartons an odd quantity of cartons?

A No, not when they are talking about 633, no.

Q In what context would you consider five to eight cartons a lot?

A If there were ten cartons in the load.

Q Well, if you have a warehouse or a trucking concern like this, and you see five to eight

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2 cartons, you don't consider that a large quantity,
3 do you?

4 A In relationship to a business, no.

5 Q Okay.

6 I show you a report which is Government
7 Exhibit 3-A which was graciously given to me by
8 Mr. Cocoran and ask you if you see any reference to
9 the amount of any cartons seen on the 19th when you
10 made your observations.

11 (Handed to the witness.)

12 A After reading this document I see no indication
13 of 633. But I don't understand why the question is
14 raised in relation to this document.

15 MR. MATALON: Could you read my question
16 back, please, with the Court's permission.

17 THE COURT: Sure.

18 Read it back.

19 (The court reporter reads the requested
20 portion.)

21 THE COURT: He doesn't see it and it's
22 not there. All right.

23 Q Do you see any reference in that report
24 as to the description of the quantity of cartons?

25 MR. COCORAN: Your Honor, I am going to

1
2 object to the procedure. Is Mr. Matalon trying
3 to offer this as a prior inconsistent statement
4 of some sort? I haven't heard any represent-
5 ation by Mr. Colgan that such figures were in
6 this report.

7 THE COURT: Either it's there or not.
8 It's only two paragraphs.

9 Are they there or not?

10 THE WITNESS: There are no figures.

11 BY MR. MATALON:

12 Q I am talking about an adjective, not
13 a figure.

14 A I understand the point of your question.

15 Q You do understand the point of my
16 question?

17 A If you recall my direct testimony, it was Mr.
18 Haimson himself who showed me the larger portion of
19 the merchandise, at which point--

20 THE COURT: Mr. Colgan, let's take one
21 step at a time. He just wants to know if there
22 is anything in the report that refers in a
23 general way, just to the quantity of the cartons.

24 THE WITNESS: The report states larger
25 number or large quantity.

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MR. MATALON: Reading from the report,
your Honor--

BY MR. MATALON:

Q Does the report state it was observed
on this date that the left large overhead door was
opened and from the street was seen a large number of
cartons bearing in bright red lettering, quote,
Brazil, Franciscano?

A That's what the report says.

Q And you dictated that report, did you
not?

THE COURT: On the 21st.

Q Right.

A Yes.

Q And so then it was not just five or
eight cartons you observed from the street, there
was a large quantity of cartons you observed from the
street?

A I observed five to eight.

Q Excuse me?

A I observed five to eight.

Q And that is from your recollection?

A That's correct.

Q And after you read this report which I

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just read to you which you prepared or dictated two days later and signed it on the--I don't know when you signed it, but I assume you signed it shortly thereafter. In spite of that you say you only observed five or eight cartons?

A That's my recollection.

Q And this doesn't help you refresh your recollection to a better recollection?

A No, sir. The first time I have seen this document is just now in the recent past.

Q Well, when you--when this was dictated and transcribed did you read it at that time?

A I would have to say yes.

Q When you read it, if there were any errors in there you would have made some changes, wouldn't you?

A If there were any substantive errors, yes.

Q Doesn't the word "large quantity", isn't that a substantive error?

A I don't feel it is.

Q You don't feel so?

A No.

Q All right.

So the point is, sir, that you were

1
2 totally convinced from the street on the day of the
3 19th before you entered the premises that you
4 identified some of the contraband that was reported
5 hijacked?

6 A Am I convinced, did you ask?

7 Q Well, there is no question in your mind
8 you saw those cartons in the street--when you were
9 in the street, rather, as identified from that photo,
10 that the cartons that you saw were the cartons of
11 the reported contraband?

12 A That's correct.

13 Q And you were on the street at that time?

14 A I was on the street.

15 Q That's what I mean.

16 I mean you were not within the building
17 line of those premises, were you?

18 A I was not within the building.

19 Q You were outside the building line and
20 you made that observation from outside the building
21 line?

22 A That's correct.

23 Q And that's the same building you walked
24 past on the 18th from east to west and glanced in
25 there for a second?

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A That's correct.

Q Sir, when you observed these cartons from the street did they all bear in bright red lettering the words Brazil, Franciscano?

A I believe some of the cartons were facing in different directions and at least one of the cartons I did observe in red lettering, Brazil, Franciscano, yes.

Q And on the other cartons you observed the marking of the red triangle as you testified?

A That's correct.

Q Is it a triangle?

A No, a diamond.

Q What is it?

THE COURT: A diamond.

Q And you observed also the lettering LB colon 040 from the street?

A No. I don't recall I testified to that.

Q You didn't testify to that?

A Not from the street.

Q What did you observe from the street?

A I believe I testified and observed from the street the red diamond, the letters MIC and the word Dunham, which was also contained within the red

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diamond on that label.

Q Do you remember testifying on direct you said you proceeded to the location on 2-19-75, there was an open bay door on that location, as soon as I came upon an opening to enter I saw the labels and the cartons from the stolen load, markings, red diamond, letters in black, and the numbers LB:040? Do you remember testifying to that on direct examination?

A Not as I looked into the building from the street. I don't believe I said I saw the letters and the bottom numbers from the street. I don't believe I said that, counselor.

Everything else, the diamond, the letters, the wording, but I don't recall and I doubt that I said I saw the letters from the street, the letters LB:040.

Q How far were you while on the street to the nearest carton to you?

A Approximately twenty-five to thirty-five feet.

Q Is that about the same distance it is from you now?

A No. It's about eighteen to twenty feet now.

Q Can you make out the black letters that are down there now?

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A Yes, barely. I can read the numbers, but I can't tell if that's a B or a P there.

Q You did testify that it bore the lettering Brazil, Franciscano?

A It bore those words. Actually, in what order they came, I don't recall that.

Q Well, I refer you to Government's Exhibit 3A and ask you to read it and maybe this helps you refresh your recollection.

A I did read where it says Brazil, Franciscano in that order.

Q And it's quoted, is it not?

A Yes, it is.

Q It is?

A Right.

Q I am not clear on one point, if you may clear my thoughts.

After you told Officer Dowd to go to the other agent who was in the car, what did you do?

A What did I do?

Q What did you do?

A I stayed on the street and I believe I took two steps back or three steps back from the opening of the building.

1

2

Q In what direction?

3

A Toward the car, west.

4

Q You mean west?

5

A West.

6

Q And did you then make any further

7

observations inside?

8

A No.. I waited for Agent Dowd to rejoin me.

9

Q How long did it take Agent Dowd to leave

10

and return?

11

A A very short period of time, a half a minute

12

maybe, twenty seconds; not long.

13

Q Twenty seconds?

14

A You asked me. I am trying to approximate. It

15

was a very short period of time.

16

Q Did you see him run down to the other

17

agent? Was he running or walking?

18

A The car was parked very nearby.

19

Q Was he running or walking?

20

A I believe he walked. There was no need to run.

21

Q And in twenty seconds he came right back?

22

A Approximately twenty to thirty seconds; not

23

very long.

24

Q And you didn't leave the area you said

25

you were at where you walked a little bit westerly?

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A Right.

Q And you could see if any trucks were pulling into that location from where you were standing, right?

A Right.

Q Any trucks pull in?

A Not in that short a period of time.

Q Any trucks pull out?

A No.

Q Did you see any unusual activity of men coming in or workers coming in?

A No, I did not.

Q You did not?

Did you feel your life was in danger in any way or you were in any peril?

THE COURT: He testified he didn't.

MR. MATALON: At the time he was waiting for Mr. Dowd to come back, I just wanted to cover that point, your Honor.

THE COURT: I thought his entire testimony covered the entire period.

MR. MATALON: Fine, if that's the Court's recollection.

Q Now, when you entered the premises, sir--

1
2 before you entered the premises is it your testimony
3 you told Officer Dowd that after the observations,
4 or that you testified that after the observations you
5 asked Dowd to ask the third agent in the car to radio
6 that you found the stolen shipment? Are those the
7 words you used?

8 A I don't recall. It very well could have been,
9 yes, sir.

10 Q That you found the stolen shipment?

11 A Yes.

12 Q Not that you found five or eight cartons?

13 Now, when you finally got to talk to the
14 gentleman you identified as Mr. Haimson on the 19th,
15 you testified that you came to him and you asked him
16 who was in charge of the building or who owned the
17 building?

18 A I think those--yes, I would have to say my first
19 words would have been who was the owner of the
20 building.

21 Q Now, we are talking about the interview
22 with Mr. Haimson and now we can refer to this report
23 that you say you dictated that deals with the interview
24 of Mr. Haimson.

25 A Yes.

1

2

Q Is that correct, sir?

3

A Yes, it is.

4

Q All right.

5

6

7

8

Now, in your report you say that Irving Haimson, owner of Michael's Trucking Company at that address advised that he is the individual that controls the building located at that address?

9

A That's what the report states.

10

11

12

Q What does that word mean to you, controls? Does it mean he is the landlord or owns the building or what?

13

14

15

16

A In my mind that's the individual who has the right to grant a consent search or not, a person in control of the premises, whether he is the person who leases, rents or owns.

17

18

19

Q Well, did you ever determine on that morning before you proceeded to your search if there were any other tenants in that building?

20

A Before--

21

22

23

24

25

MR. COCORAN: I object, your Honor. It's totally irrelevant since there are no other tenants here to challenge or complain about the search. It's only Mr. Haimson present at this hearing and if Mr. Haimson gave

1
2 his consent it doesn't matter if there were other
3 tenants in the building.

4 THE COURT: I think you are correct, but
5 I do not wish to restrict the inquiry and I
6 will permit the question.

7 A I think you best reword the question or ask it
8 again.

9 THE COURT: Read the question back.

10 (The court reporter reads back the
11 requested portion.)

12 A Prior to the search, no, I did not know there
13 were other tenants in that building--I stand corrected--
14 if there were other tenants in the building?

15 Q If there were. And you made no inquiry
16 to find out if there were any?

17 A I didn't feel I had to.

18 Q I understand your feelings, sir.
19 I am asking whether you did.

20 A No.

21 Q When you walked into the place you said
22 you saw some booths, right, like offices?

23 I show you a picture in Government's 1-I.

24 A Yes.

25 Q Right?

1

2

A Yes.

3

Q And that's located on the north side of

4

the building as you go in where the trucks go in.

5

A Okay.

6

Q Is that correct?

7

A Yes.

8

Q And was this sign on the building saying

9

Air Freight Forwarding, Air Freight Specialists?

10

A Yes, it was.

11

Q And there was a telephone number there?

12

A Yes, there is.

13

Q Do you know whose telephone number that

14

is?

15

A No, I do not.

16

Q Is that Mr. Haimson's phone number?

17

A I don't know Mr. Haimson's number.

18

Q You do not know?

19

A No.

20

Q All right.

21

How many offices did you see there all

22

together?

23

A When we had entered we saw two men at an office

24

and that's where we went.

25

I honestly don't recall seeing any other offices

1

2

at all on that particular moment at all.

3

Q Possibly, sir, if you look at the

4

picture maybe your recollection would be refreshed.

5

A I know what the picture purports.

6

Q Yes.

7

Does it help refresh your recollection

8

as to what you saw?

9

A I think the question was what did I initially

10

do or see when I first walked in.

11

Q Let me repeat the question, if I may.

12

Other than seeing these two gentlemen

13

in this one office, did you see any other partitioned

14

offices?

15

A Not when I walked in, no.

16

Q Did you see any offices on top of the

17

offices where the two gentlemen were standing?

18

A No, I did not.

19

Q Did you ask anybody if there were one

20

tenant here, two tenants, three tenants or four

21

tenants?

22

A No, I did not.

23

Q Did you ask who controlled the space

24

in the area where you saw that large--the five or

25

eight cartons?

1

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A Yes, I did.

3

Q Who did you ask that of?

4

A Mr. Haimson.

5

Q What did he say?

6

A He said it was his freight area.

7

Q I see.

8

And did you then ask him what freight

9

areas are apportioned to others?

10

A I don't believe--I don't recall the exact

11

sequence of events, but at some point I did ask

12

if all this freight was his and at that time I

13

learned it was not all his, that he sub-leased part

14

of the building to other people.

15

Q To other people?

16

A Some other point in the day. When, I don't

17

recall.

18

Q Oh, you learned that later?

19

A Yes, sir.

20

Q Did you find out what areas these other

21

people leased space in?

22

MR. COCORAN: I will renew my objection.

23

Again, your Honor, this is perhaps

24

relevant to the trial if Mr. Matalon is trying to

25

establish knowledge as to Mr. Haimson's

1
2 relationship to these goods. But right now
3 the question is whether these goods were legally
4 seized. Whether they are half a dozen or
5 two dozen tenants storing goods in the building
6 is not relevant.

7 MR. MATALON: I see somebody giving
8 consent to search a place, and if it's not
9 his place he can't consent to it. He hasn't
10 established that.

11 THE COURT: But as to the consent to
12 search with respect to those areas which were
13 not Mr. Haimson's, Mr. Haimson is in no position
14 to object.

15 MR. COCORAN: He has no standing.

16 MR. MATALON: Except they can say, your
17 Honor, that there was a consent to search areas
18 where he could not control.

19 THE COURT: Did Mr. Haimson consent to
20 the area where these cartons were? That's
21 the question.

22 MR. MATALON: It hasn't been established
23 that area belonged to him.

24 THE COURT: Whether it belonged to him
25 or not, I think the question is one of control.

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MR. MATALON: No. I can't get a policeman and say, "Go into that apartment and you have my consent to do a search."

THE COURT: If you control the apartment or you are the tenant.

MR. MATALON: I live in the building.

THE COURT: It's not your apartment?

MR. MATALON: No.

MR. COCORAN: If it was Mr. Haimson's position he would have waived the Fourth Amendment rights he didn't have and then he didn't have standing to bring the suppression motion. Either he had standing by virtue of the control of the premises or he has no ground for the motion.

THE COURT: Is there any other basis on which this testimony is relevant?

MR. MATALON: I will stop this line of testimony, your Honor. Maybe Mr. Cocoran is right. It does belong at the time of the trial.

THE COURT: All right.

BY MR. MATALON:

Q Let's get to the issue of your conversation with Mr. Haimson.

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Now, you testified he was advised of your identity, you told him you were an FBI Agent?

A That's correct.

Q Right.

And you showed him your credentials?

A Right.

Q And Mr. Dowd did the same thing?

A I don't recall if Mr. Dowd did. I know I did.

Q Did you introduce Mr. Dowd as an agent?

A I would have introduced him, yes.

Q And where were you standing at this time?

A To the best of my recollection it was right in front of Mr. Haimson's glass partition.

Q You mean where he was standing before, where he came out?

A Yes.

Q He came out and he was standing next to you and Mr. Dowd when you identified yourself as FBI Agents?

A He was standing right there.

Q He was standing there, right?

A Right.

Q There is no partition between the two

1

2

of you, right?

3

A No.

4

Q And what did you do? Did you tell him

5

you observed some contraband?

6

A I advised him of our identities and the fact

7

that we were investigating a hijacking and cartons

8

from this hijacking were observed by me on the

9

street in this premise.

10

Q Yes.

11

And then what did you do after that?

12

A I believe I asked Mr. Haimson for a consent

13

search.

14

Q What words did you use? You didn't

15

say a consent search.

16

A Yes, I believe I did.

17

Q That's what you said?

18

A I asked him since at this moment he already

19

advised me he controlled the building, and I asked

20

him did he own it or lease it.

21

And I think originally he said, "I leased it."

22

He came out and he said, "No, I don't own it, but I

23

lease it and I rent the premises."

24

And at which time I told him who we were and

25

advised him of our purpose and I asked him if he wanted

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a consent search.

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4

Q Those are the words you used, "Do you want a consent search"?

5

6

A To the best of my knowledge those are the words we used.

7

8

Q All right.

9

10

And what else did you do before you proceeded to do--do or say before you proceeded to search?

11

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15

A Before Mr. Haimson even gave me a yes or no answer on my request for a consent search, I immediately advised him he had a constitutional right to demand a search warrant for these premises and that would be obtained by me.

16

17

18

Q Did you tell him what procedure you have to follow to get a search warrant?

19

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22

23

A No, I did not.

24

25

Q You didn't tell him you have to go to a magistrate and make out an affidavit and give some testimony as to the probability of a crime and you wanted to do a search? You didn't tell him all that, did you?

A I don't believe I did. I don't recall.

Q You gave it to him in general terms,

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"You have a constitutional right to a search warrant"?

A He replied that--

Q I understand. I want to know if you said that.

A Yes, to the best of my recollection.

Q And when you talk about consent, you use the word consent search?

A The words were consent search or consent to a search. I can't be specific at this time.

Q Did you use any other adjectives to elaborate on the word consent?

A I don't recall.

Q And what was his reply, if any; not what he did? What was his reply?

A His reply was simply that a search warrant would not be necessary; that he would agree to a search on this premises.

Q Did he say, "I don't know anything; go look around and do whatever you want to do?"

A No, he did not.

Q How did he say it? He didn't use those words?

A I just told you. He said, "A search warrant will not be necessary. You look around and I will show

1

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you around."

3

Q He said it's not necessary, look

4

around?

5

A His words were that a search warrant wasn't
6 necessary.

7

Q Look around?

8

A Something to that effect.

9

Q Right?

10

A Yes.

11

Q Like a protestation of innocence?

12

MR. COCORAN: Objection, your Honor.

13

Q It's not necessary, look around?

14

THE COURT: Sustained.

15

Q Isn't that the impression you got from

16

him when he said that?

17

MR. COCORAN: Objection.

18

THE COURT: You better start with another
19 question again.

20

Q Did you get the impression when he said,

21

"A search warrant wouldn't be necessary, go ahead
22 and look around," that it was a protestation from an
23 innocent person, "I have nothing to hide, look around"?

24

MR. COCORAN: Objection.

25

THE COURT: Overruled.

77-1026

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

- against -

IRVING HAIMSON,

Defendant.

75 CR 219
FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ APR 21 1977 ★

TIME A.M.
P.M.

UNITED STATES COURTHOUSE
August 6, 1976

BEFORE:

HONORABLE GEORGE C. PRATT, U.S.D.J.

(Corrected copy of Page 107)

HARRY RAPAPORT, C.S.R.
Acting Official Court Reporter

I hereby certify that the foregoing is
a true and accurate transcript from my
stenographic notes in this proceeding.

[Signature]
Official Court Reporter
U. S. District Court

1
2 Answer the question.

3 THE WITNESS: I think it calls for a con-
4 clusion on my part.

5 MR. MATALON: That's exactly what I want.

6 MR. COLGAN: What was your impression?

7 THE WITNESS: I don't think it was anything
8 like that.

9 BY MR. MATALON:

10 Q You don't think so?

11 A No, not at all.

12 THE COURT: What did you think it was?

13 THE WITNESS: I think he knew he didn't
14 have any other chance, he could demand a
15 search warrant, but I think he impressed me
16 as a fairly intelligent man and he just realized,
17 "I might as well let them search."

18 BY MR. MATALON:

19 Q You drew the conclusion from having a
20 few words with him that he was a very intelligent
21 man?

22 THE COURT: Fairly intelligent man.

23 Q You drew that conclusion?

24 A You asked a question and I answered it.

25 Q You drew that conclusion?

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*Paula
Gerson*

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A Yes.

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Q And you did say he said he had no other choice?

5

A No. Perhaps that's what he felt, I don't know.

6

7

MR. MATALON: Your Honor, can I inconvenience the Court for a five minute break?

8

If it's a great inconvenience, I will continue.

9

I would like to refreshen myself, if I can.

10

I don't think I have more than ten minutes or

11

so,

12

THE COURT: All right. We will take a five minute recess.

13

14

MR. MATALON: Thank you very much, your Honor.

15

16

(A recess is taken.)

17

18

MR. MATALON: I just have a few more questions, your Honor, and then I will be through.

19

20

THE COURT: Fine.

21

BY MR. MATALON:

22

23

24

Q Mr. Colgan, when you were inside the premises already and you had the conversation with Mr. Haimson you did find 633 cartons of shoes?

25

A That's correct.

1

2

Q And I am sure we will all agree that that's

3

a large quantity of cartons?

4

A Yes, it is.

5

Q At the time you were inside did you

6

feel any peril to yourself?

7

A Is that the end of your question?

8

Q Yes.

9

A No, I did not.

10

Q You didn't?

11

A No.

12

Q You didn't feel you were in any danger,

13

were you?

14

A No.

15

Q And you didn't see anybody trying to

16

dispose of these cartons in some way?

17

A No, I did not.

18

Q You did testify there were no trucks

19

in the bay?

20

A Except the coffee truck.

21

Q Except the coffee truck?

22

A Yes.

23

Q And it would take a pretty large trailer

24

truck to load those cartons up, would it not?

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A For the whole load, yes.

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Q For the whole load?

A Yes.

Q And as a matter of fact, were you there when the Federal Bureau of Investigation removed it?

A Yes, I was.

Q And did they use one trailer or two or how did they remove it?

A We had the trucker of St. Johnsbury come and take their goods on their own truck.

Q Was that a large trailer?

A Yes, it was.

Q And how many men had to be used to load it up?

A I don't recall.

Q You don't recall?

A I honestly don't recall.

MR. MATALON: I have no further questions, your Honor. Thank you very much.

THE COURT: Any redirect?

MR. COCORAN: One or two, your Honor.

REDIRECT EXAMINATION

BY MR. COCORAN:

Q Mr. Colgan, when you went out on the 18th to conduct your initial street investigation, you went

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alone, did you not?

A Yes, I did.

Q Did you enter any buildings on that date?

A On the 18th, no, I did not.

Q Did you ever enter a building alone to conduct a search of stolen goods?

A Not usually, no.

Q You returned the next day with fellow agents. Is that correct?

A Yes, it is.

Q How many buildings did you go to before you went to 139-11 95th Avenue?

A I distinctly remember two and probably three.

Q And you went in those buildings?

A I did, with other agents.

Q And you conducted searches with the other agents on the morning of the 19th?

A Yes. Owners and proprietors consented to search.

Q In that area?

A Yes.

Q And you were looking for those Dunham shoes you subsequently found at 139-11 95th Avenue?

A That's correct.

Q Is it your procedure in the Bureau to

1
2 report on a daily basis to your superior as to what
3 you have done each day?

4 A No, it is not.

5 Q You testified you received consent to
6 search that premises from a Mr. Haimson. Is that
7 correct?

8 A That's correct.

9 Q Do you see that individual in the court-
10 room today?

11 A Yes, I do.

12 Q Could you indicate to the Court who it
13 was?

14 A Mr. Haimson is wearing a blue suit today sitting
15 next to Mr. Matalon.

16 MR. COCORAN: May the record reflect
17 that Mr. Colgan referred to the defendant.

18 THE COURT: Yes.

19 MR. COCORAN: Thank you.

20 No further questions.

21 THE COURT: Any further cross?

22 MR. MATALON: No, your Honor.

23 THE COURT: Any more witnesses?

24 MR. COCORAN: Yes, your Honor; one more.

25 THE COURT: Thank you, Mr. Colgan.

1 THE WITNESS: You're welcome, your Honor.

2 (The witness is excused.)

3 MR. COCORAN: The Government calls

4 Donald Dowd.

5 DONALD E. DOWD, called as a witness,
6 having been first duly sworn by the clerk of the court,
7 was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. COCORAN:

10 Q By whom are you employed, Mr. Dowd?

11 A I am a special agent with the Federal Bureau of
12 Investigation.

13 Q And how long have you been with the
14 FBI?

15 A Approximately eight years.

16 Q In what capacity?

17 A As a special agent.

18 Q Are you assigned to any particular
19 squad?

20 A Yes, I am.

21 Q What squad is that?

22 A The New Rochelle Metropolitan Agency.

23 Q How long have you been in New Rochelle?

24 A April 1st of this year.
25

1

2

Q What were you doing prior?

3

A Working on the Truck Hijacking Squad for six years in New York City.

4

5

Q And were you so working in February 1975?

6

A I was.

7

Q I call your attention to February 19th,

8

1975. Were you working that day?

9

A Yes, I was.

10

Q And what was your assignment that day?

11

A I, along with several other agents, including

12

Mr. Pat Colgan, were conducting a street search in

13

the vicinity of Atlantic Avenue and Van Wyck Express-

14

way in Queens.

15

Q How many agents were involved on that

16

morning, February 18th?

17

A I believe six.

18

Q You operated in teams or were you all

19

working together?

20

A Yes, in different cars.

21

Q And where did you go that morning, sir?

22

A We first started on the east side of the Van

23

Wyck Expressway, two or three blocks north and south of Atlantic Avenue.

24

25

THE COURT: Did you say started on the

1
2 east side?

3 THE WITNESS: On the west side, excuse
4 me; on the west side of Atlantic Avenue and
5 the Van Wyck Expressway; and went into one of
6 the two buildings I recall we went into was an
7 extremely large appliance warehouse and we
8 asked for a consent search and told the owners
9 we are looking for a load of Dunham Shoes.
10 And we searched that warehouse and it took
11 quite, over an hour, I believe. And the other
12 was an olive oil company; and went in there for
13 a half hour or so.

14 BY MR. COCORAN:

15 Q In each of these places did all six
16 agents participate in the search?

17 A In the larger we did, the appliance warehouse,
18 yes.

19 Q Who are the other agents?

20 A To the best of my knowledge it was John Good,
21 Alan Garber, Patrick Colgan and Joseph Pistone and
22 myself (all phonetic spellings).

23 Q Did there come a time when any of those
24 agents discontinued to search?

25 A Yes.

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Q Approximately what time?

A Around noon.

Q And at that time had any of the Dunham Shoes been recovered?

A No, they had not.

Q What did those agents do, to the best of your knowledge?

A Went about their normal business.

Q Sir, at that time.

A I went with Mr. Colgan and Mr. Pistone to search the area to the east of the Van Wyck Expressway off Atlantic Avenue.

Q And did there come a time you approached 135-11 95th Avenue?

A Yes.

Q Prior to approaching that building do you have any knowledge as to the contents of that building?

A No, I did not.

Q Had you received any information from Mr. Colgan as to the contents of that building?

A No, I did not.

Q And what occurred when you got there, sir?

A I believe Mr. Pistone stayed in the car or

1
2 immediately outside of it and Mr. Colgan and myself
3 approached and opened a door of 135-11 95th Avenue
4 from the west by the door and peered into the warehouse.

5 Q And were any observations made by your-
6 self at that time?

7 A Well, Mr. Colgan was in front of me and I was
8 just to the rear of him and he mentioned that those
9 are the cartons. Prior to that he told me we were
10 looking for a brown carton with a white label bearing
11 the red shaped diamond inscription on it along with
12 the letters MIC, and supposedly written above that
13 was the word Franciscano.

14 Q What did you do when Mr. Colgan told
15 you that those are the cartons at that particular
16 premises?

17 A I was surprised. He told me to tell Pistone
18 to call the other agents back to this location, which
19 I did.

20 Q Did you have occasion then to enter that
21 premises?

22 A Yes, we did, shortly thereafter.

23 Q Did you have occasion to meet with
24 Mr. Haimson in that premises?

25 A Yes, I did.

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Q Do you see him here in the courtroom today?

A Yes, I do. (pointing)

MR. COCORAN: Indicating.

THE WITNESS: Yes, the blue suit, blue
and white striped shirt with a white collar.

Q Did you have a conversation with Mr.
Haimson?

A I did not, no.

Q And anyone have a conversation with
Mr. Haimson in your presence?

A Yes, Mr. Patrick Colgan did.

Q And what was that conversation, if you
recollect?

A He advised him of his identity and my identity.

Q When you say "He" you mean Mr. Colgan?

A Yes.

That we were investigating a stolen load of
Dunham Shoes and from the street we had observed
several of the cartons inside his warehouse.

Q Did Mr. Haimson make any response?

A Well, prior to that Pat had asked him if he
was the owner or the controller of the warehouse--
not exactly in those words.

But he said he did control the warehouse.

1
2 Thereafter Pat told him about the investigation
3 involving the Dunham Shoes and that we observed them
4 from the street.

5 Q Was there any further conversation
6 between Mr. Colgan and Mr. Haimson in your presence?

7 A Yes.

8 Mr. Colgan advised Mr. Haimson that we wished
9 to have his consent to search the warehouse and that
10 he did not have to provide that consent, that he
11 can demand a search warrant, which was his con-
12 stitutional right.

13 And Mr. Haimson indicated it wouldn't be
14 necessary, and escorted Mr. Colgan over to the
15 side of the warehouse where the Dunham Shoes were
16 located.

17 Q What did you do then, sir?

18 A There was another individual present when we
19 first walked in and I stationed myself between him
20 and Mr. Colgan and Mr. Haimson and then I went over
21 to that individual and took him over to his lunch
22 truck and interviewed him regarding the Dunham
23 Shoes.

24 MR. COCORAN: Thank you. I have no
25 further questions of this witness.

1
2 THE COURT: Cross-examine.

3 CROSS-EXAMINATION

4 BY MR. MATALON:

5 Q Mr. Dowd, were you here in court during
6 the entire testimony of Mr. Colgan?

7 A No, sir, not during the entire time. I was
8 in and out.

9 Q Well, did you hear most of the testimony
10 he testified to?

11 A Yes, I heard a lot of it.

12 Q You heard what he testified about what
13 occurred on the 19th when he was there with you?

14 A Yes, sir.

15 Q You heard that?

16 A Yes, I did.

17 Q And you heard him testify as to what
18 he said, as to the conversation he had with Mr.
19 Haimson?

20 A Yes, sir.

21 Q And you heard all that?

22 A Yes.

23 Q And you were here in court during that
24 time?

25 A Yes, I was.

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Q Let me ask you, sir, Mr. Dowd, you said on the morning of the 19th you were directing your attention to the west side of the Van Wyck Expressway, north and south of Atlantic Avenue, I believe that's the expression you used?

A Yes.

Q During the course of that morning did you have a conversation with Mr. Colgan regarding the east side, any conversation at all?

A No, I did not.

Q Did he tell you that the day before he was on the east side of the Van Wyck Expressway?

A No, sir, he did not.

Q He didn't tell you that?

A No.

Q And who suggested that you then view the east side or investigate the east side?

A Mr. Colgan did.

Q Did he tell you why you were directing your attention to the west side that morning?

A I was under the impression that what they were looking for was on either side and we really didn't know. And we just started searching on the west side.

Q And tell me when you went to the east

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side how did you get from the west side of the Van Wyck Expressway--you have to go over a parkway, I assume, to go over to the east side, the Van Wyck. How did you do that?

A I don't know the exact route we took. I presume it was Atlantic Avenue.

Q But you do recall crossing over the Van Wyck Expressway on an overpass of some sort?

A Not specifically.

Q You have no recollection?

A No, sir.

Q All right.

Tell me, how soon after you crossed over, or you got from the west to the east side, or how far you did it, your recollection is not clear, did you end up at 139-11 95th Avenue?

A I would say five, seven minutes maybe.

Q And was that the first stop that you made?

A Well, we drove slowly up and down several of the blocks there and then wound up there.

Q Eventually you stopped the car?

A Yes.

Q Is that correct?

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A Yes.

Q And when you stopped the car you and Mr. Colgan got out of the car or Officer or Agent-- I don't know how you refer to them--Agent Pistone stayed in the car?

A Yes, in the car or next to the car.

Q And you proceeded together as a team with Mr. Colgan?

A Yes.

Q Correct?

A Yes.

Q And you went to this building and then you said Mr. Colgan was on the sidewalk and you were a little behind him as he testified and he showed on the exhibit, and then he turned to you and I think you said he said, "Those are the cartons"?

A Something to that effect, yes.

Q I wrote it down as you said it.

A I don't know if those are his exact words, if he said, "Those are the cartons," or, "That's part of the load," or something of that nature. He indicated that's what we were looking for.

Q He said that?

A Yes, sir.

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Q All right.

Did he say anything else to you--

A I--

Q --aside from directing you or asking you to go to Agent Pistone and radio for the other agents?

A I don't recall if he did.

Q Did you have any discussion with him about getting a search warrant?

A No, we did not.

Q Did he ask you at any time if your recollection helps you, to tell Pistone to wire to the other agents and get a search warrant and we will wait here?

A No, we did not.

Q Did you know what direction you were walking when you approached these premises?

A We approached it from the west; walking east.

Q And about what time was that, Mr. Dowd?

A Around noon.

Q Around noontime?

A Yes, sir.

Q And how would you describe the weather conditions on that day?

A I remember it wasn't raining. That's about the

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best of my recollection. It was a clear day as far as I can remember.

Q By the way, did you make any written memorandums of the events leading up to your entry into the premises on the 19th?

A No, sir, I did not.

Q You made no notes at all?

A No, I did not.

Q While you were in a car riding around with Agent Colgan and Agent Pistone, did Mr. Colgan show you a copy of the label that was purported to be on the contraband merchandise?

A Not that I remember, no, sir.

Q And did he brief you on what he was looking for?

A Early in the morning he briefed everybody.

Q And when he briefed you did he use any demonstration of any samples? Did he show you something?

A No, sir, he didn't.

Q Did he draw anything on a board?

A No.

Q His descriptions during that briefing was strictly oral?

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A Yes, to the best of my recollection it was oral.

3

It could have been done on a radio, I think. We didn't

4

have any formal briefing at the office or anything like

5

that.

6

Q All right.

7

But you had no recollection of ever seeing

8

any material label?

9

A No.

10

Q Just a descriptive event that you got

11

either from the radio or from Mr. Colgan?

12

A Right.

13

Q Is that right?

14

A Yes.

15

Q And would it be fair to say he was the

16

lead investigator here, he was the one who was going

17

to do the identifying?

18

A Yes, he was the case agent.

19

Q He was the case agent?

20

A Right.

21

Q In other words, if you walked in it would

22

be possible you may not have recognized these cartons?

23

A I think I would have from the description he gave

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me; yes, I would have.

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Q And do you know how many cartons you were

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looking for?

A The load was over 600.

Q 633, I think we established that?

A Yes.

Q Tell me, sir, at the time that you approached the building on the 19th did you feel any danger to yourself in any way?

A Well, I am a very careful agent, Mr. Matalon. I approach everything as if it's a dangerous situation.

Did I feel any danger? Not any imminent danger, but I--

Q I meant danger or peril. I appreciate your remark.

A No.

Q Did you see any trucks in the bay at the time you were standing behind Mr. Colgan?

A There was one truck, a white a silver lunch wagon.

Q That's the lunch wagon?

A Yes.

Q And did you see any trailers or large trucks that transported merchandise?

A No.

Q And eventually--by the way, when you left

1
2 Mr. Colgan to go and speak to Agent Pistone, how much
3 time did that take?

4 A Five seconds, ten seconds.

5 Q Did you walk or did you run?

6 A I don't really know.

7 Q I see.

8 You said that when Mr. Colgan turned to
9 you and said, "That's the load," you said you were
10 surprised?

11 A Yes, I was.

12 Q What was the basis of your surprise?

13 A I was surprised we found it.

14 Q What did you say? Did you say, "Whoopee,
15 it's great"? Or what did you say?

16 A No, it wasn't quite like that. It was more of
17 a congratulations, I think than anything else.

18 Q When you came back and went into the
19 premises with Mr. Colgan, was there any truck or
20 trailer in the bays at that time?

21 A You mean after we observed the cartons?

22 Q When you walked in, as you were walking
23 in to find out who to speak to.

24 A Just the lunch wagon.

25 Q Just the lunch wagon?

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2 A Yes.

3 Q Did you feel any impending danger or
4 immediate peril at that time?

5 A No.

6 Q And did you see anybody doing anything
7 with those cartons or unloading them or loading them?

8 A No, I did not.

9 Q All right.

10 Did you at any time during the whole
11 period of time feel that these cartons would be
12 removed, was there any indication that they were going
13 to be removed soon, that there were a lot of men
14 around ready to load or unload a truck?

15 A No.

16 Q You did not see them, did you?

17 A No, sir.

18 Q How many people did you see in the place,
19 by the way, all together besides Mr. Haimson?

20 A Two. In addition to Mr, Haimson only one.

21 Q That's all that was on the premises?

22 A That's all I saw right there at that time.

23 Q That's all you saw?

24 A Yes.

25 Q I see.

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And how long would you say you were on the premises before Mr. Haimson or Mr. Colgan went over and observed the cartons?

A You mean after he had talked to Mr. Haimson?

Q Yes.

A Maybe two or three minutes.

Q Is it not a fact that Mr. Haimson was not placed under arrest until some time later that afternoon?

A Yes, sir, that's correct.

Q About--would you say about--well, the report here says about 3:45. Would that help you refresh your recollection?

A It could have been. It was later on, after the U.S. Attorney had been contacted.

Q Right.

And during that period of time, from the time you were there when you entered the place around noontime, up until the time he was placed under arrest, did any trucks pull in, any trailers pull in that you observed?

A Several people did come and go. As far as trucks were concerned, I don't believe so.

Q When you entered the premises did Mr.

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Colgan point out anything to you?

A No.

Q When he said, "I found the load," or he identified the load, did he point where it was, anywhere where it was?

A That was from the street.

Q From the street, yes.

A The general direction. I could see that myself.

Q You saw it?

A Yes.

Q These are the markings Mr. Colgan made. Would you agree that it's about the general vicinity?

A The three lines?

Q Yes.

A The general vicinity. I wouldn't say they were close to this platform. I would say back a few feet.

Q And you said you saw them yourself from the street?

A Exact cartons, the number, I don't remember. But at least two stacks of three or four each, so that would be six or eight or ten; somewhere in that neighborhood.

Q Did you at any time have a discussion or suggest to Mr. Colgan that we better get a search

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warrant?

A No, sir.

Q You did not?

A No.

MR. MATALON: I have no further questions.

THE COURT: Any redirect?

MR. COCORAN: No, your Honor.

THE COURT: Mr. Dowd, one question.

When Mr. Haimson said the search warrant was not necessary, you said he escorted Mr. Colgan to the side of the warehouse where the cartons were located.

Now, just where did they first walk to at that point?

THE WITNESS: Your Honor, it was just around the corner--

THE COURT: The one you just looked at?

THE WITNESS: No, the one that shows the two office windows.

THE COURT: That would be 1(a) or is it 1(i)?

All right, looking at Exhibit 1(i).

THE WITNESS: I was standing around here because there was another man here and I was

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watching him.

THE COURT: So you were standing near the--

THE WITNESS: Near the corner.

THE COURT: Near the glass window?

THE WITNESS: More towards the corner
so I can walk down here.

THE COURT: Slightly to the left of the
center of the photograph?

THE WITNESS: Then there is Mr. Haimson
at the side door there.

THE COURT: Yes.

THE WITNESS: So we walked around and
walked directly over here and this is where all
the shoes were.

THE COURT: Behind the office area as
you looked down from the street?

THE WITNESS: Well, the load was from
here to here all the way back, except for a
walkway through here. There were several cartons
here and then there was kind of a walkway here.

THE COURT: When you say several cartons
here, you are now referring to Exhibit 1(D) and
you're indicating roughly the area near those
parallel lines Mr. Colgan pointed out on the

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photograph?

THE WITNESS: Yes.

THE COURT: And where were the other
cartons in relation to those parallel lines?

THE WITNESS: A little behind toward the
post.

THE COURT: That would be toward the left
side of the photograph?

THE WITNESS: Of the photograph, yes.

THE COURT: And to the right of the office
area as you look at it from the street. Is that
correct?

THE WITNESS: That's correct.

THE COURT: All right.

I understand.

I have no further questions.

Thank you, Mr. Dowd.

Does the Government have any further
evidence?

MR. COCORAN: As Agent Dowd indicated, there
are some four or five further agents available,
should Mr. Matalon wish to call them or the
Court wish to question them. The Government
would have no other witnesses at this time.

2 THE COURT: Mr. Matalon.

3 MR. MATALON: I don't intend to call any
4 of the agents.

5 THE COURT: Do you intend to call any
6 other witnesses?

7 MR. MATALON: No.

8 THE COURT:: So both the Government and
9 the defendant rest as far as this hearing is
10 concerned?

11 MR. COCORAN: Yes, your Honor.

12 THE COURT: Does either of you have any
13 legal authority you wish to direct my attention
14 to?

15 MR. COCORAN: I would like to direct
16 your attention to the factual situation, if I
17 might, and make argument on the situation we
18 have before us and Mr. Matalon may go first,
19 if you wish.

20 If your Honor wishes a memorandum on this,
21 I will certainly provide you with one.

22 We concede there are no exigent circum-
23 stances here and that is what Mr. Matalon, I
24 believe, was concerned with.

25 The Government's contention is merely that

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2 first of all these goods were in plain view from
3 the street. They were also in a public area
4 within the building itself, which is a business
5 warehouse, a storage warehouse. And the agents
6 as well as anyone else were free to walk into
7 it. And the boxes, aside from being visible
8 to the street, were visible as you walked in.
9 And consequently, they were seizable at that
10 time.

11 Beyond that there was a consent to search
12 here and there was absolutely no need for a
13 search warrant where there is a consent to
14 search. There is no Fourth Amendment violations
15 where an individual permits the police to
16 search.

17 So on two grounds the defendant's motion
18 should be denied.

19 THE COURT: Mr. Matalon.

20 MR. MATALON: Yes.

21 If your Honor please, it's the defendant's
22 position that the observation made by Officer
23 Colgan on the 18th indicated by inference, if
24 you will, that he did observe those cartons on
25 that day and that those cartons were kept under

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2 surveillance from the 18th, I believe, to the
3 19th. And I think we could draw that conclusion.
4 And I think it's a fair conclusion to draw
5 because he was there for a reason on the 18th.
6 And I don't subscribe to his testimony about
7 the sun being in his eyes and making a one
8 second observation in an open area. And that
9 being so, he certainly had sufficient time to
10 secure a search warrant, especially since there
11 was no emergency. The goods were not being
12 destroyed or carted away. It's not like a
13 similar case where you give it a--

14 THE COURT: The Government concedes there
15 are no exigent circumstances here. He could
16 have ten weeks to get a warrant and if he goes
17 and asks for consent and gets it, isn't it
18 valid?

19 MR. MATALON: I think the Court would
20 agree that the cases would indicate and hold
21 that primarily an agent or police officer should
22 first get a search warrant. That's the first
23 thing he should consider; not getting a consent
24 and falling short on a consent and getting a
25 search warrant then.

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2 The Fourth Amendment says that there will
3 be no unusual search and seizures. It doesn't
4 say you get consent and then get a search warrant
5 if there is no consent. And the purpose of a
6 search warrant is to have an independent member
7 of the judiciary review the facts upon which
8 the party is seeking a search warrant, so that
9 we have this difference between an officer's
10 desires and an ambition to do the search and a
11 person who is intended to search. We have
12 this judiciary where this judicial person is
13 in the middle to sort of maybe at times restrain
14 such ambition at the time.

15 So maybe we have to work with the idea,
16 that there should be a search warrant, not first
17 that there should be a consent and then request
18 a search warrant or that the person consent to
19 it. Then the question of the consent becomes
20 a question. Is it an informed consent? Does
21 the party or did the party really consent to a
22 search? Is that fact, the statement saying,
23 well, you don't need a search warrant, go ahead
24 and do it, is that a protestation of innocence?
25 Does he feel imperiled in some way or in danger

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2 or feel he is sort of wrapped up between two
3 FBI agents that he is in some kind of fear,
4 that if he says he doesn't consent maybe some-
5 thing will happen to him?

6 That's the reason for getting a search
7 warrant, so that citizens do not have to be
8 subjected to that.

9 I submit the consent here is not a
10 valid, intelligent and informed consent. The
11 consent here was really a protestation of
12 innocence. He said, "Look around. Do what
13 you want."

14 And certainly the words that were used
15 by Officer Colgan in requesting of this gentle-
16 man, "Would you give us a consent search," now,
17 I submit to your Honor, you ask any ordinary
18 citizen in the street, "Would you give me a
19 consent search," and he won't know what the
20 heck you are talking about. These are legal
21 terms and those are terms involved in a case
22 by the judiciary, by men of legal minds to
23 formulate phrases in order to prove their point
24 or to expand on their point. This is not
25 ordinary terms used by laymen, a consent search.

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2 I submit, your Honor, there are very few people
3 in the street today who would know what a
4 consent search is. So I submit there was no
5 consent search and the defendant did not know
6 what he was consenting to if he consented at
7 all and in essence it's a protestation of
8 innocence, your Honor.

9 So on those two grounds, on the ground
10 that the People or the United States had suff-
11 icient time, had sufficient time to get a
12 warrant, even at the time when Officer Colgan
13 made the observation on the street. He said,
14 "It never entered my mind to get a search warrant."
15 He was going in to get a consent. That's what he
16 was going in for.

17 That's not what the law says. The law
18 says first try to get a search warrant. And
19 then if there is some problem in some way, then
20 maybe you can get a consent. And it has to be
21 an informed consent and not a protestation of
22 innocence.

23 So he didn't tell Officer Dowd to go and
24 tell Officer Pistone to go get a search warrant
25 and we will keep the place under cover. There

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2 was no danger of that merchandise being moved.
3 There was no trucks in the bay. There were
4 633 cartons.

5 I submit the proper procedure and what
6 the Constitution dictates is for Officer Colgan
7 to have informed Officer Dowd to go and get a
8 search warrant and I will wait here and watch.
9 That's what I think should have been the proper
10 procedure.

11 THE COURT: Well, there is no question
12 that that might have been done.

13 MR. MATALON: Yes.

14 THE COURT: But that's not the question
15 I have to decide. I have to decide whether
16 what they did do is permissible under the
17 Constitution.

18 MR. MATALON: I submit it isn't, your
19 Honor, for the arguments I have advanced.

20 THE COURT: I will reserve decision.

21 MR. COCORAN: Might I make one or two
22 more comments?

23 THE COURT: Yes.

24 MR. COCORAN: Your Honor, first of all,
25 I think for the sake of argument, not that I

1
2 think it's relevant, but Mr. Matalon contends
3 that Mr. Colgan somehow went through this
4 lengthy procedure of going out on the 18th and
5 back on the 19th to avoid getting a warrant.

6 I think it's clear from the testimony of
7 the agents, the uncontested testimony of the
8 agents that, quite frankly, it doesn't--there
9 is not much room for credance of that theory.
10 Mr. Colgan was clearly out there on the 18th.
11 He was out there for investigative purposes.
12 He was certainly not going to attempt to recover
13 these goods alone. He had no intention of going
14 into any of the buildings on the 18th of
15 February alone. He was merely trying to locate
16 the goods. And he indicated he was both on the
17 west side and the east side of the Van Wyck
18 and the Atlantic--Atlantic Avenue. And he did
19 not discover the goods on the 18th and that he
20 had no opportunity to secure a warrant and that
21 he wanted one is clear from the activities of
22 the agents on the morning of the 19th.

23 The suggestion is explicit in what Mr.
24 Matalon has brought forth that Mr. Colgan would
25 take six agents out and search other buildings

1
2 needlessly.

3 THE COURT: Just a try to discovering
4 them after the other agents have left.

5 MR. COCORAN: Yes. It doesn't make
6 sense.

7 Secondly, consent is an established
8 exception to the warrant requirement. And to
9 argue, as Mr. Matalon does, that you should
10 first attempt to obtain a warrant from a
11 judicial officer and only upon failing to
12 obtain such a warrant then go out and seek a
13 consent search would be inaccurate. A consent
14 search is something done in lieu of getting a
15 warrant. It wouldn't be done if a magistrate
16 tells you, you don't have sufficient reason to
17 go out.

18 THE COURT: Does either of the gentlemen
19 know of any cases on the question of whether
20 there are any preconditions to, or time re-
21 strictions on a consent search?

22 MR. COCORAN: I don't think it's ever
23 been litigated, your Honor.

24 THE COURT: The question whether or not
25 it's an informed, intelligent search, that I

1
2 understand. But Mr. Matalon spoke as if there
3 was a presumption against the Government using
4 a consent search. And if there are any cases
5 on that, would you, gentlemen, just telephone
6 the citations into my law clerk some time on
7 Monday and I can review them. If there are not,
8 you don't have to make a call. And if I don't
9 hear from you--I will be surprised if there
10 were.

11 MR. COCORAN: I would also, with regard
12 to the contents itself, Agent Colgan didn't
13 merely say, "We would like a consent search."
14 The testimony from Agent Colgan to Agent Dowd
15 is as well that Mr. Haimson was informed he
16 could require a warrant, he had a constitutional
17 right to a warrant, and he need not give a
18 consent search. If there was any doubt in his
19 mind by what a consent search was, when he was
20 told that they could get a search warrant, I
21 think in the mind of any layman that that would
22 be cleared up.

23 And also location of the goods, and
24 because of the access to the streets, and they
25 were in plain view, these goods were seizable

1
2 as contraband without a warrant and without
3 consent. The agents could have merely seized
4 them. They were in plain view.

5 THE COURT: Yes, some of them were.

6 MR. COCORAN: Yes. But when they approach-
7 ed the goods in the front, the others were
8 in plain view from there. So it's not exactly
9 a bootstrap argument.

10 THE COURT: That theory can take them
11 very deep into the bowels of this warehouse.

12 MR. COCORAN: Yes, but at least they
13 were authorized by a plain view doctrine to
14 take the cartons that were visible to the
15 street and then they would be authorized to
16 seize any other goods within their view because
17 they would be lawfully in the premises. And
18 I think there is no question here that the
19 agents acted consistently with the Constitution.
20 They had a reason to enter the premises. It
21 was public and, moreover, they had consent of
22 the owner to search the premises before they
23 seized these goods.

24 THE COURT: If I were to end up with
25 the conclusion that the only thing that

1
2 authorized this search was the plain view
3 doctrine you have spoken of, the conclusion might
4 be suppression of all but five to eight cartons.

5 MR. COCORAN: I don't believe so, your
6 Honor, because under the law you could seize
7 anything you can lawfully see.

8 THE COURT: See initially.

9 MR. COCORAN: That's analogous to the
10 Shimmel (phonetic spelling) doctrine. Once
11 they are inside seizing those goods anything
12 else in view can be seized as well.

13 THE COURT: It occurred to me even with
14 the five to eight cartons we are still dealing
15 with a felony.

16 MR. COCORAN: Excuse me?

17 THE COURT: Even with five or eight
18 cartons we are still dealing with a felony. Is
19 that correct?

20 MR. COCORAN: Yes.

21 THE COURT: It won't change the crime.

22 MR. COCORAN: No. It might change the
23 nature of the proof, your Honor. But the point
24 of fact, the pictures indicate once inside the
25 premises the entire side of the building is

1
2 open to view. That area to the right of the
3 offices is open to view.

4 THE COURT: I realize that.

5 All right, if you have any authorities,
6 telephone them into my chambers on Monday.

7 I will reserve decision and hopefully
8 get something to you in writing next week.

9 MR. COCORAN: Thank you, your Honor.

10 THE COURT: Have a nice weekend.

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Excerpts from transcript of hearing - October 27,
1976 - re: plea of guilty - showing reservation of
right to review suppression order on appeal from judgment.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

IRVING HAIMSON,

Defendant

75 CR 219

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E. D. N.Y.
★ DEC 27 1976 ★
TIME A.M. _____
P.M. _____

United States Courthouse
Brooklyn, New York

October 27, 1976
1:45 o'clock P.M.

Before:

HONORABLE GEORGE C. PRATT, U.S.D.J.

I hereby certify that the foregoing is
a true and correct copy of the
transcript of the hearing held on

Perry Auerbach

Official Court Reporter
U. S. District Court

PERRY AUERBACH
OFFICIAL COURT REPORTER

10
[Handwritten initials]

Excerpts from transcript of hearing - October 27, 149.
1976 - re: plea of guilty - showing reservation of [8]
right to review suppression order etc.

1 for the purpose of effecting the objectives thereof,
2 the defendant Irving Haimson committed the following
3 overt act:

4 On or about the 13th day of February, 1975,
5 the defendant Irving Haimson, did receive and have in
6 his possession at 139-11 95th Avenue, Queens, New
7 York, approximately 633 cartons of stolen Dunham
8 shoes; all in violation of Title 18, United States
9 Code, Section 371.

10 Are you ready to plead to that charge?

11 THE DEFENDANT: Yes.

12 THE COURT: What is your plea?

13 THE DEFENDANT: Guilty.

14 THE COURT: Is there any plea agreement?

15 MR. CADEN: Your Honor, it's my understanding
16 that the plea agreement entered into between the
17 United States of America and the defendant, through
18 his counsel, is that at the time of -- Well, A, that
19 the defendant reserves his right to appeal the denial
20 of the motion to suppress, and if he pursues that
21 right, then at the time if indeed his conviction is
22 affirmed by the Court of Appeals that the underlying
23 indictment, which I believe is 75 CR 219, would be
24 dismissed.

25 THE COURT: Is that your understanding,

1 Mr. Matalon?

2 MR. MATALON: I missed the point about the
3 underlying indictment. You mean the new indictment?

4 MR. CADEN: No. The underlying indictment
5 means the original indictment, and that the original
6 indictment would remain filed in the courthouse, and
7 the Court would not move to dismiss unless and until
8 the defendant either brought his appeal to the Court
9 of Appeals or until the Court of Appeals confirmed his
10 conviction.

11 THE COURT: In other words, the underlying
12 indictment will remain pending the outcome of the
13 appeal.

14 MR. CADEN: That's correct.

15 MR. MATALON: He will be pleading to the
16 superceding indictment.

17 THE COURT: Yes. Is that also your
18 understanding, Mr. Haimson?

19 THE DEFENDANT: Yes.

20 THE COURT: Now, the crime of which you are
21 charged, Mr. Haimson, is conspiracy to possess stolen
22 shoes, which were stolen in interstate commerce. The
23 crime itself that is charged is a conspiracy, which
24 means an agreement of some sort between your and
25 others who are not named in the superceding information,

1 on the superceding information or the underlying
2 indictment.

3 Now, what is the situation with respect to bail?

4 MR. CADEN: Your Honor, the defendant is on a
5 \$5,000 personal recognizance bond, and the Government
6 has no objection to its continuance.

7 MR. MATALON: If your Honor pleases, may I be
8 heard on that question, also?

9 THE COURT: You don't need to.

10 MR. MATALON: I just want to make it clear for
11 the record that his appearances here in court have
12 been without exception on time on every occasion.

13 THE COURT: I am aware of that, and I think
14 under the circumstances, particularly as to the
15 potential arguments which may be made in connection
16 with the appeal from the ruling on the suppression
17 hearing, I will direct that the bail continue in that
18 form. The matter is adjourned without bail for
19 sentencing pending preparation of the pre-sentence
20 report, and when it is prepared, your attorney,
21 Mr. Matalon, will be notified what the date for
22 sentencing will be, and of course you are aware,
23 Mr. Matalon, that as soon as the pre-sentence report
24 is prepared you have a right to review it and can
25 bring it to my attention any inaccuracies or comments

Excerpts from transcript of hearing - December 17,
1976 - re: sentence - showing reservation of right to
review suppression order on appeal from judgment.

152.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

FILED

CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

UNITED STATES OF AMERICA

★ JAN 17 1977 ★

-against-

TIME A.M. _____

75 CR 219 (S)

P.M. _____

IRVING HAIMSON,

Defendant.

United States Courthouse
Brooklyn, New York

December 17, 1976
11:30 o'clock A.M.

B e f o r e :

HONORABLE GEORGE C. PRATT, U.S.D.J.

I hereby certify that the foregoing is
a true and accurate transcript from my
stenographic notes in this proceeding.

Ilene Ginsberg

Official Court Reporter
U. S. District Court

ILENE GINSBERG
OFFICIAL COURT REPORTER

11
[Signature]

Excerpts from transcript of hearing - December 17, 1976 - re: sentence - showing reservation of right to [9] review suppression order etc. 153.
~~sentence under 18 United States Code Section 3651 as~~

follows:

It is adjudicated that the defendant is fined the sum of \$2,500 and in addition is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years and on condition that the defendant be confined in a jail-type or treatment institution for a period of six months. The execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant is placed on probation for a period of two-and-a-half years, to commence upon the defendant's release from confinement.

That is the judgment of the Court.

Are there any motions?

MR. CORCORAN: Yes.

With regard to the underlying indictment, 75 CR 219, the Government moves to dismiss that underlying indictment.

THE COURT: Motion granted.

MR. MATALON: If your Honor pleases, the defendant -- Would you permit the defendant to remain on parole pending an appeal?

THE COURT: There is going to be an appeal from the suppression motion, is there not?

1 MR. CORCORAN: I believe that was the agreement
2 at the time.

3 THE COURT: I will stay execution of sentence
4 for a period of one week, and if within that period
5 a notice of appeal is filed, the execution will be
6 further stayed until final determination of the appeal.

7 MR. MATALON: Thank you very much.

8 THE COURT: Thank you, gentlemen.

9 * * *

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I hereby certify that the foregoing is
a true and accurate transcript from my
stenographic notes in this proceeding.

Glenn Ginsberg

Official Court Reporter
U. S. District Court

William

RECEIVED
U. S. ATTORNEY

FEB 25 1 30 PM '77

EAST. DIST. N. Y.

*Paula
J. G. Moore*